



1982 REPORT

**ADMINISTRATIVE
CONFERENCE
OF THE UNITED STATES**

Robert R. Anthony



1982 REPORT ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

LETTER OF TRANSMITTAL

Administrative Conference of the United States
Office of the Chairman
Washington, D.C.

June 1983

To The President and the Congress of the United States:

I have the honor to transmit herewith the 1982 Report of the Administrative Conference of the United States.

This report describes the significant activities of the Administrative Conference for the twelve month period from January 1, 1982, through December 31, 1982.

Respectfully,

LOREN A. SMITH
Chairman

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EDWARD C. SCHMULTS, Deputy Attorney General, Department of Justice

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EDWARD L. WEIDENFELD, attorney, Washington, D.C.

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A. JAMES BARNES, General Counsel, Department of Agriculture

C. JONATHAN BENNER, General Counsel, Federal Maritime Commis-
sion

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eral Reserve System

PETER A. BRADFORD*, Commissioner, Nuclear Regulatory Commission

THOMAS A. BROOKS*, General Counsel, Federal Deposit Insurance Corporation

C. M. BUTLER III, Chairman, Federal Energy Regulatory Commission

JOSEPH A. CANNON, Associate Administrator for Policy and Resource Management, Environmental Protection Agency

DAVID A. CLANTON, Commissioner, Federal Trade Commission

CHARLES L. CLAPP*, Commissioner, Interstate Commerce Commission

TIMOTHY F. CLEARY*, Commissioner, Occupational Safety and Health Review Commission

LOUIS A. COX, General Counsel, United States Postal Service

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JUAN A. del REAL, General Counsel, Department of Health and Human Services

DENNIS A. DUTTERER, General Counsel, Commodity Futures Trading Commission

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JOHN M. FOWLER*, General Counsel, Department of Transportation

KENNETH W. GIDEON*, Chief Counsel, Internal Revenue Service

ROBERT L. GILLIAT, Assistant General Counsel, Department of Defense

LAWRENCE B. GLICK, Solicitor, Commission on Civil Rights

DARRELL J. GRINSTEAD*, Assistant General Counsel, Department of Health and Human Services

LOUIS B. HAYS, Associate Commissioner, Social Security Administration

ROGER A. HOOD, Assistant General Counsel, Federal Deposit Insurance Corporation

* Term of service ended during 1982

** Former members appointed as senior fellows during 1982

MICHAEL J. HOROWITZ, Counsel to the Director for Policy Analysis and Law, Office of Management and Budget

S. NEIL HOSENBALL, General Counsel, National Aeronautics and Space Administration

HOWARD JENKINS, JR., Member, National Labor Relations Board

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MARTIN H. KATZ*, General Counsel, Consumer Product Safety Commission

JOHN J. KNAPP, General Counsel, Department of Housing and Urban Development

ALLIE B. LATIMER, General Counsel, General Services Administration

MICHEL LEVANT, Administrative Law Judge, Federal Energy Regulatory Commission

PHILIP A. LOOMIS, JR.** , Commissioner, Securities and Exchange Commission

BEVIS LONGSTRETH, Commissioner, Securities and Exchange Commission

K. E. MALMBORG, Assistant Legal Advisor, Department of State

JANE A. MATHESON, Chief Counsel, Occupational Safety and Health Review Commission

JOSEPH A. MORRIS, General Counsel, Office of Personnel Management

MARVIN H. MORSE, Director, Office of Administrative Law Judges, Office of Personnel Management

J. E. MURDOCK III, Chief Counsel, Federal Aviation Administration

DANIEL OLIVER, General Counsel, Department of Education

R. DAVID PITTLE*, Vice Chairman, Consumer Product Safety Commission

JOHN L. PRESSLY, Associate Deputy General Counsel, Veterans Administration

FRANK P. REICHE, Chairman, Federal Election Commission

JONATHAN C. ROSE, Assistant Attorney General, Office of Legal Policy, Department of Justice

* Term of service ended during 1982

** Former members appointed as senior fellows during 1982

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EDITH BARKSDALE SLOAN, Vice Chairman, Consumer Product Safety Commission

J. CLAY SMITH, JR.*, Acting Chairman, Equal Employment Opportunity Commission

FRANK S. SWAIN, Chief Counsel for Advocacy, Small Business Administration

REESE H. TAYLOR, JR., Chairman, Interstate Commerce Commission

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THOMAS P. VARTANIAN, General Counsel, Federal Home Loan Bank Board

WALTER E. WARREN*, General Counsel, Small Business Administration

MARGERY H. WAXMAN, Deputy General Counsel, Department of the Treasury

ANDREW J. YOUNG*, Associate Commissioner for Hearings and Appeals, Social Security Administration

SETH D. ZINMAN, Associate Solicitor, Division of Legislation and Legal Counsel, Department of Labor

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DAVID M. BARRETT, attorney, Washington, D.C.

ROGER B. BARTH, attorney, Washington, D.C.

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CLARK BYSE**, professor of law, Harvard Law School, Cambridge, Massachusetts

* Term of service ended during 1982

** Former members appointed as senior fellows during 1982

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SHELDON S. COHEN*, attorney, Washington, D.C.

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GEORGE E. DANIELSON*, Justice, California Court of Appeals, Los Angeles, California

KENNETH CULP DAVIS**, professor of law, University of San Diego School of Law, San Diego, California

RICHARD A. DERHAM, attorney, Seattle, Washington

RICHARD W. DUESENBERG, Vice President and General Counsel, Monsanto Co., St. Louis, Missouri

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JOHN IZARD*, attorney, Atlanta, Georgia

RONALD J. JAMES*, attorney, Cleveland, Ohio

PAUL L. JOSKOW*, professor of economics, Massachusetts Institute of Technology, Cambridge, Massachusetts

PAUL D. KAMENAR, Director of Litigation, Washington Legal Foundation, Washington, D.C.

* Term of service ended during 1982

** Former members appointed as senior fellows during 1982

RHODA H. KARPATKIN*, Executive Director, Consumers Union, Mount Vernon, New York

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EARL W. KINTNER*, attorney, Washington, D.C.

JERRIS LEONARD, attorney, Washington, D.C.

HANS A. LINDE*, Associate Judge, Supreme Court of Oregon, Salem, Oregon

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* Term of service ended during 1982

** Former members appointed as senior fellows during 1982

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WYATT B. DURRETTE, JR., Director, Advisory Commission on
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* Term of service ended during 1982

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HENRY ROSE, General Counsel, Pension Benefit Guaranty Corporation

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MILTON J. SOCOLAR, General Counsel, General Accounting Office

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JANET D. STEIGER, Chairman, Postal Rate Commission

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* Term of service ended during 1982

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NORMA B. SMITH
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SHARON D. ANDERSON
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SUSAN M. MACK
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THERESA C. YOUNG

* Resigned September 28, 1982

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Chairman Loren A. Smith, left, confers with Reese H. Taylor, Jr. (Member—Interstate Commerce Commission) at the 25th Plenary Session.

CHAIRMAN'S FOREWARD

The letter of transmittal set out inside the front cover of this annual report begins with the standard formal statement: "I have the honor of transmitting this annual report" In this case, the phrase is more than a mere formality, as I am truly proud of the accomplishments of the Administrative Conference during the year 1982. It was a very productive year.

The most important immediate single result of our efforts was the adoption of the nine formal Conference positions—seven recommendations and two statements—described in this report. My staff has also successfully completed its efforts to advise agencies concerning their regulations under the Equal Access to Justice Act and, during 1982, prepared and transmitted to the Congress the first annual report on agency activities under that Act. This Office welcomes congressional assignments like that given us in the Equal Access to Justice Act, I might add, and we believe that our efforts have satisfied congressional expectations. Still another special project which we began during the year is our consultative work on the Merit Systems Protection Board's alternative dispute resolution system. We hope that this project, also described in this report, will prove to be a model for additional cooperative efforts between the Conference and other federal agencies.

In addition, with the appointment of many new public members and the reappointment of others, plus the creation of a new class of non-voting members called senior conference fellows, the Conference now has an excellent mix of people. Our new members will give us new and different approaches to the problems we deal with, and our group of continuing members have a reservoir of knowledge and experience concerning the body of administrative law in general and the past activities of this agency in particular that is invaluable in assuring continuity. We have also streamlined the standing committee structure, and this structural improvement should further enhance the productivity of our membership in the next few years.

I believe that each and every one of our members—whether councilors, agency representatives, public members, liaison representatives or senior conference fellows—shares my pride in our achievements during 1982. We have indeed furthered our mission of improving the fairness and efficiency of the government's administrative processes and procedures. The staff of my office should also be pleased with the results of their efforts in support of these accomplishments.

The year 1982 also marked the beginning of what I hope will be a series of efforts to increase the effectiveness of the Conference as a "clearinghouse" for information on regulatory, management, and similar issues within government. In April a new informal group called the Council of Independent Regulatory Agencies, consisting of the chairmen of the fourteen major independent regulatory agencies, held its first meeting in the White House with the President. This group, which I head, holds meetings on a monthly basis, and its initial efforts are described in this report. Suffice it to say here that I intend to expand this concept of creating informal, intra-governmental groups—centered around one or more related issues—to other areas in which exchanges of ideas and information may assist in promoting more informed governmental decisions and in reducing the balkanization that inevitably affects an organization as large and diverse as is our federal establishment. We have already begun to sponsor monthly meetings of the general counsels of these same independent regulatory agencies, and there well may be other areas in which similar groups would be useful.

In 1983 the Conference will also of course continue its traditional research activities, and our pending projects are listed in this report. Since the Conference is basically a reactive agency—responding to perceived problems within the government as they arise—it would not be productive to attempt to predict the particular projects with which the Conference will be engaged in the years ahead. I do think, however, that there will be two discernible themes underlying our future efforts that may be of interest.

First, there is an increasing concern within the federal establishment over what has been called the problem of "gridlock." In an effort to increase openness in government, and to enhance the ability of all interested citizens to at least observe their government at work, the Congress in the 1970's enacted the Federal Advisory Committee Act and the Government in the Sunshine Act. In addition, Congress substantially increased the ability of the public to obtain information from agencies through the Privacy Act and the 1974 amendments to the Freedom of Information Act. At the same time, Congress began to impose additional procedures on rulemaking at a number of agencies, creating what are known as "hybrid" rulemaking requirements, and the courts during this period also handed down a number of decisions that had the effect of requiring agencies to elaborate their rulemaking procedures. The Paperwork Reduction Act of 1980 imposed an additional layer of review on regulations that involve the collection of information or recordkeeping requirements.

The result of all of this may well have been to create a system in which efforts to limit overregulation, and to reduce the burdens imposed by those regulations that are truly necessary, are seriously impeded by the virtual ossification of the process that is the collective result of all of these protective statutes and court-imposed structures. One theme,

therefore, that will be evident in our work will be to do what we can to ensure that the government structure does not become so complex that it really cannot function or achieve any kind of real regulatory improvement.

The second theme that we will stress concerns our efforts to examine regulatory problems from a point of view that is not purely one of legal scholarship. The Conference's mandate—as set out in our organic act—is extremely broad. It authorizes the Conference to examine virtually any aspect of agency organization, procedure, or management, excluding only military and foreign affairs functions and “the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.” (5 U.S.C. 572(3)). But the Conference is an agency whose members for the most part are lawyers, reflecting the fact that lawyers and jurists were its founders. And, because of this, the Conference has perhaps narrowly construed its mandate—it has not often ventured far from those subjects traditionally associated with administrative law, and has usually viewed those subjects solely from the vantage point of traditional legal scholarship.

It recently has seemed to be the case, however, that more and more of the questions we find ourselves considering would benefit from the expertise and perspectives of experts from such fields as economics, public administration, and political science. We will thus attempt to make greater use of experts from these areas in selected Conference research projects. The Conference will move cautiously in this direction, of course, since the objective is not to shift away from the approaches we have traditionally used, and which have proven very successful, but to complement them with contributions from these disciplines. We hope, in experimenting with projects not based solely on traditional legal scholarship, to increase the practical utility of the recommendations we produce.

I would like to close by again acknowledging the enormous contributions of our volunteer membership, without which we would not be a Conference, and our consultants, to such a productive year for this agency. These members receive not one penny of compensation for their time, and our consultants are certainly not becoming wealthy men or women from the small amounts we are able to pay for their efforts. Yet everyone involved with the Conference continues to give substantial amounts of time—and the benefit of expertise and years of experience—in furtherance of the goal of increasing the fairness and efficiency of federal governmental processes and procedures. The year 1982 is one in which, I believe, the Conference well served the President, the Congress, and the process—and, most importantly, the taxpayers.

LOREN A. SMITH



Chairman Smith greets guests at the Reception for the 25th Plenary Session. Above: James G. Watt, Secretary of the Interior. Below: Jerry Carmen, Administrator of the General Services Administration, and Mrs. Carmen.



Chairman Smith chats with members and guests at the Reception for the 25th Plenary Session. Above: Judge Antonin Scalia (Senior Fellow), center, and John R. Block, Secretary of Agriculture, right. Center: Lyn Nofziger, of the Washington, D.C. consulting firm of Nofziger and Bragg, left, and Robert J. D'Agostino (Public Member), center. Below: Edwin Meese III, Counselor to the President, left, and Eugene R. Sullivan, Deputy General Counsel, Department of the Air Force, center.

ORGANIZATION AND OPERATION OF THE CONFERENCE

The Administrative Conference of the United States was established as a permanent independent federal agency by the Administrative Conference Act of 1964 (5 U.S.C. §§571–576) and was activated by the appointment of its first Chairman in January 1968. Its purposes are to identify causes of inefficiency, delay, and unfairness in administrative proceedings affecting private rights, and to recommend improvements to the President, the agencies, the Congress, and the courts. The statute and bylaws governing the organization and operation of the Conference are set forth at the end of this report.

The Conference consists of three related parts—the Office of the Chairman, the Council, and the Assembly.

THE OFFICE OF THE CHAIRMAN

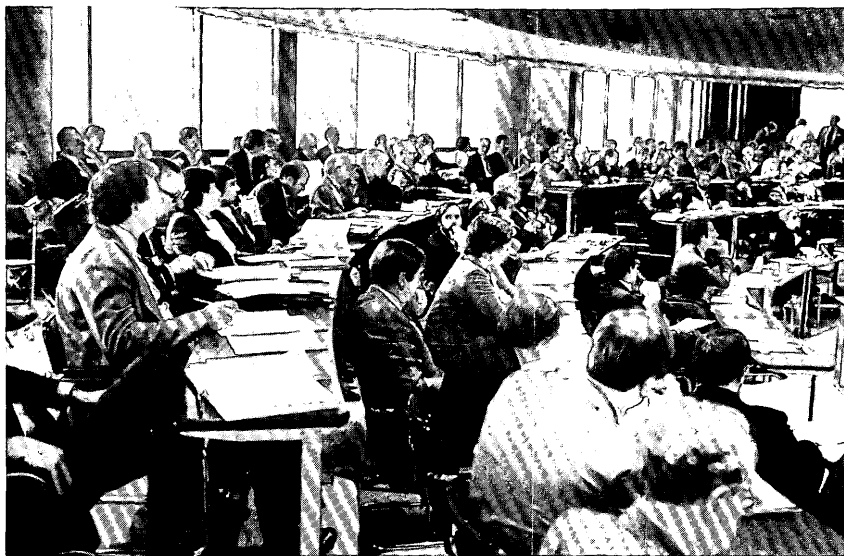
The Chairman of the Administrative Conference is appointed by the President, with the advice and consent of the Senate, for a term of five years. The Chairman is the chief executive of the Conference and its only full-time compensated member.

The Chairman, with the approval of the Council, appoints the public members of the Conference. The Chairman presides at plenary sessions of the Assembly and at Council meetings, and is the official spokesman for the Conference in relations with the President, the Congress, the judiciary, the agencies, and the public. The Chairman has authority to investigate matters brought to his attention by individuals inside and outside government, and to designate subjects for Conference recommendations. The Chairman is served by a small permanent staff whose principal duties are to furnish administrative and research support to the Assembly and committees of the Conference, to coordinate and assist the work of consultants, and to help the Chairman in securing implementation of recommendations and in providing advice and assistance to the agencies and to committees of the Congress.

Loren A. Smith, the sixth Chairman of the Administrative Conference, was appointed by President Ronald Reagan on June 30, 1981.

THE COUNCIL

The Council consists of the Chairman and ten other members who are appointed by the President for three-year terms, of whom not more



The Assembly debates a proposal at the 25th Plenary Session, held December 16 and 17 in the Amphitheatre of the Federal Home Loan Bank Board in Washington, D.C.

than one-half may be employees of federal agencies. The Council's functions are similar to those of a corporate board of directors. It has authority to call plenary sessions of the Conference and fix their agendas, to recommend subjects for study, to receive and consider reports and recommendations before they are considered by the Assembly, and to exercise general budgetary and policy supervision.

The membership of the Council did not change during 1982.

THE ASSEMBLY

Structure of the Assembly

The members of the Conference, when meeting in plenary session, constitute the Assembly of the Conference. The numbers of members, by statute, may not be fewer than 75 nor more than 91. The Conference, at the end of 1982, had 91 members. The Chairman and the other members of the Council account for 11 of this number. The remaining 80 fall into three groups.

Independent boards and commissions

First, the Administrative Conference Act confers membership upon the chairman of each independent regulatory board or commission or a person designated by the agency. (5 U.S.C. §573(b)(2).) Under this provision 14 boards and commissions have statutory members. In addition, pursuant to 5 U.S.C. §573(b)(4), one of these agencies has been allotted a second member by the Council for the purpose of permitting

the designation of an administrative law judge. The agencies in this category, with the number of members, are:

1. Board of Governors of the Federal Reserve System	1
2. Civil Aeronautics Board	1
3. Commodity Futures Trading Commission	1
4. Consumer Product Safety Commission	1
5. Federal Communications Commission	1
6. Federal Election Commission	1
7. Federal Energy Regulatory Commission	2
(includes administrative law judge)	
8. Federal Home Loan Bank Board	1
9. Federal Maritime Commission	1
10. Federal Trade Commission	1
11. Interstate Commerce Commission	1
12. National Labor Relations Board	1
13. Nuclear Regulatory Commission	1
14. Securities and Exchange Commission	1
Total	15

Agencies designated by the President

Second, the Act grants membership to the head (or the designee of the head) of each executive department or other administrative agency designated for this purpose by the President (5 U.S.C. §573(b)(3)). Under this authority, the President has designated 13 Cabinet departments for membership, and the Council has acted to provide some of them additional members. The Cabinet memberships are:

1. Department of Agriculture	1
2. Department of Commerce	1
3. Department of Defense	1
4. Department of Education	1
5. Department of Energy	1
6. Department of Health and Human Services	2
(includes Social Security Administration)	
7. Department of Housing and Urban Development	1
8. Department of the Interior	1
9. Department of Justice	1
10. Department of Labor	1
11. Department of State	1
12. Department of Transportation	2
(includes Federal Aviation Administration)	
13. Department of the Treasury	2
(includes Internal Revenue Service)	
Total	16

The other administrative agencies designated for membership by the President (including an additional appointment by the Council of an administrative law judge position from one of the agencies) are:

1. Environmental Protection Agency	1
2. Equal Employment Opportunity Commission	1

3. Federal Deposit Insurance Corporation	1
4. General Services Administration	1
5. National Aeronautics and Space Administration	1
6. Occupational Safety and Health Review Commission	1
7. Office of Management and Budget	1
8. Office of Personnel Management	2
(includes administrative law judge)	
9. Small Business Administration	1
10. U.S. Commission on Civil Rights	1
11. U.S. Postal Service	1
12. Veterans Administration	1
Total	13

Non-government members

The final group consists of non-government members appointed for 2-year terms by the Chairman with the approval of the Council. These "public" members, who are required by the Administrative Conference Act to comprise not less than one-third nor more than two-fifths of the total membership, are selected in such a manner as to provide broad representation of the views of private citizens of diverse experience. They are chosen from among members of the practicing bar, scholars in the field of administrative law or government, and others specially informed with respect to federal administrative procedure. They are reimbursed for travel expenses but otherwise serve without compensation.

At the close of 1982 the public members numbered 36, and there was no vacancy. The terms of all incumbent public members will expire on June 30, 1984. A bylaw amendment adopted during 1982 (1 C.F.R. §302.2(b)) limits all public members to four terms of service.

Senior Fellows

During 1982 a new class of non-voting members was created. Under section 2(e) of the bylaws (1 C.F.R. §302.2(e), as added in 1982) former chairmen of the Conference and individuals who have served for eight or more years as members are eligible for 2-year appointments as senior fellows. Senior fellows are assigned to committees and participate in other Conference functions as members, but have no vote. Chairman Smith appointed the first sixteen senior fellows during 1982.

Former chairmen

Robert A. Anthony
Roger C. Cramton
Reuben B. Robertson III
Antonin Scalia
Jerre S. Williams

Former members

William H. Allen
Clark Byse
Kenneth Culp Davis
Warner Gardner
Cornelius B. Kennedy
Phillip A. Loomis, Jr.
Anthony L. Mondello
Owen Olpin
Max D. Paglin
James E. Wesner
Frank M. Wozencraft

Liaison arrangements

In addition, pursuant to section 4 of the bylaws (1 C.F.R. §302.4), the Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, federal agencies not otherwise represented in the Conference, and professional associations. Individuals who serve in such a capacity participate in the activities of the Conference, having privileges of the floor at committee meetings and plenary sessions, but have no vote. During 1982 Chairman Smith doubled the number of liaison arrangements by making eleven additions. The twenty-two liaison arrangements in effect at the close of 1982 are:

JUDICIARY

1. Administrative Office of the U.S. Courts	1
2. Federal Judicial Center	1
3. Judicial Conference of the United States	2
4. U.S. Court of Appeals for the Federal Circuit*	1
5. U.S. Claims Court*	1

FEDERAL AGENCIES

1. ACTION*	1
2. Advisory Commission on Intergovernmental Relations*	1
3. Central Intelligence Agency*	1
4. General Accounting Office	1
5. Executive Office of the President*	1
6. Federal Mine Safety and Health Review Commission*	1
7. Legal Services Corporation*	1
8. Merit Systems Protection Board	1
9. Office of the Federal Register	1
10. Pension Benefit Guaranty Corporation*	1
11. Postal Rate Commission	1
12. Selective Service System	1
13. U.S. International Trade Commission*	1

* Added in 1982



Members chat between agenda items at the 25th Plenary Session. Above (left to right): Chairman Loren A. Smith, James S. Munn (Public Member), and Professor Walter Gellhorn (Council Member). Below: Public Members Richard E. Wiley, left, and Professor Victor G. Rosenblum.

PROFESSIONAL ASSOCIATIONS

1. American Bar Association**	2
2. Federal Administrative Law Judges Conference	1
	—
Total	22

Operation of the Assembly

The Assembly, which has ultimate authority over all activities of the Conference, operates much like a legislative body. Acting through the adoption of bylaws, the Assembly has established standing committees to work on individual Conference projects. The committee structure was changed during 1982, as follows:

Committee Chairman

January—November

1. Agency Decisional Processes	James E. Wesner
2. Agency Organization and Personnel	Earl W. Kintner
3. Grants, Benefits and Contracts	S. Neil Hosenball
4. Informal Action	Clark Byse
5. Interagency Coordination	Owen Olpin
6. Judicial Review	William H. Allen
7. Public Access and Information	Anthony L. Mondello
8. Regulation of Business	Betty Jo Christian
9. Rulemaking	Cornelius B. Kennedy

December

1. Adjudication	Jane A. Matheson
2. Administration	S. Neil Hosenball
3. Governmental Processes	Margery H. Waxman
4. Judicial Review	H. Clayton Cook
5. Regulation	Betty Jo Christian
6. Rulemaking	Calvin S. Collier

These committees meet periodically to plan and guide research by academic and professional consultants and by the Chairman's professional staff. On the basis of this research, along with public and agency input through written comments and public hearings where appropriate, the committees frame proposed recommendations for consideration by the Assembly. When a study and tentative recommendation have been prepared, they are circulated to the affected agencies and often announced to the public for comment, then reexamined by the committee in light of the replies.

After final committee approval, a proposed recommendation is transmitted to the Council and then to the Assembly for consideration in plenary session. The Assembly may adopt the recommendation in the

** 2nd position added in 1982



Members in discussion at the 25th Plenary Session. Above: Public Members Richard W. Duesenberg, left, and John L. Ryan. Center: Council Members Michael R. Gardner, left, and Mark S. Fowler. Below (left to right): Senior Fellows Robert A. Anthony, Owen Olpin, and Frank M. Wozencraft.

form proposed by the committee, amend the recommendation, refer it back to committee, or reject it entirely.

Since January 1968 the Assembly of the Conference has adopted 95 recommendations, many with multiple parts, of which seven were adopted during the period covered by this report.

The recommendations of the Conference, along with any related research reports, are published in the annual series *Administrative Conference of the United States: Recommendations and Reports*. Recommendations and statements (but not reports) are also published in the Conference's Annual Reports (see Actions of the Assembly), in the *Federal Register*, and those of continuing interest in title 1, parts 305 and 310, of the *Code of Federal Regulations*.



Members discuss a proposed recommendation at the 25th Plenary Session. Above (front row, left to right): Council Members Edward C. Schmults, T. Timothy Ryan, Jr., Michael R. Gardner, and Mark S. Fowler. Below (front row, left to right): Betty Jo Christian (Public Member), Reuben B. Robertson III (Senior Fellow), Alan B. Morrison (Public Member), and Lawrence B. Glick (Member—Commission on Civil Rights).

ACTIONS OF THE ASSEMBLY

The Twenty-fourth and Twenty-fifth Plenary Sessions of the Administrative Conference were held in Washington, D.C., June 17 and 18 and December 16 and 17, 1982, respectively. The Conference adopted seven recommendations and two statements of views. The Conference also adopted several amendments to its bylaw provisions.

In Recommendation 82-1 the Conference calls on Congress to amend the definition of confidential business information in exemption (b)(4) of the Freedom of Information Act to increase the scope of the protection from disclosure that that exemption affords, to eliminate agency discretion to disclose such information except where the agency finds that withholding the information would injure an overriding public interest, and to improve submitters' rights to judicial review. The Conference urges agencies to give advance notice to submitters of the possibility of disclosure, and to establish procedures for handling FOIA requests and for considering submitters' views. The recommendation was proposed to the Assembly by the Committee on Regulation of Business, which was assisted by consultants James T. O'Reilly and Russell B. Stevenson, Jr., and by Kathryn M. Braeman of the Department of Justice. The proposal had originally been submitted to the Assembly in 1981, and was recommitted at that time to the Committee on Regulation of Business with instructions to confer with the Committee on Judicial Review and the Committee on Public Access and Information. These two committees reviewed the proposal and submitted separate views to the Assembly.

Recommendation 82-2 enlarges on prior Conference recommendations pertaining to federal grant programs and sets out specific procedures for agencies to use in expeditiously and fairly resolving disputes under grant programs. The recommendation was proposed by the Committee on Grants, Benefits, and Contracts with the assistance of consultant Ann Steinberg.

In Recommendation 82-3 the Conference recommends that Congress not amend the federal judicial venue statutes to make the extent of local impact determinative of proper venue applicable to suits against the government. The Conference advocates amendment of such statutes to require notice to state attorneys general when actions have a particular impact on their states and to allow intervenors in actions to request transfers of venue. The Conference also recommends that Congress review existing "exclusive venue" statutes individually rather than enact a provision overriding all of them. The venue project originated in



The Assembly acts on a proposal at the 24th Plenary Session, held June 16 and 17 in the Amphitheatre of the Federal Home Loan Bank Board in Washington, D.C.

the Committee on Judicial Review. Several members of the Conference dissent from this recommendation, and, in a separate statement, express their support for pending legislation (S. 2419) that would establish "local impact" as relevant to venue decisions. One member dissents in a separate statement on somewhat different grounds.

Recommendation 82-4 deals with a new and interesting alternative method of developing regulatory programs—negotiations among all substantially affected interests—with a view to minimizing protracted adversary proceedings and litigation. This recommendation provides procedures for conducting such negotiations, and the Conference commends their use to agencies when particular circumstances suggest a likelihood of success. The suggestion to study negotiation techniques was initially proposed to the Administrative Conference by Vice President George Bush and by Senator William V. Roth in addresses to the Assembly in 1981. Consultant Philip J. Harter assisted the Committee on Interagency Coordination on this project.

In Recommendation 82-5 the Conference suggests a comprehensive set of techniques and procedures for use by several agencies involved in the regulation of carcinogens. The recommendations are categorized into the following subject areas: priority setting, interagency coordination, chemical selection and guidelines for testing and evaluation, advisory panels, generic rulemaking, quantitative assessment of risk, and public participation. The recommendation was proposed by the Com-



The Assembly considers a parliamentary matter at the 25th Plenary Session. Above (left to right): Chairman Loren A. Smith, Richard K. Berg (General Counsel), Roger Moore (Special Parliamentarian), and Stephen L. Babcock (Executive Director). Below (left to right): K.E. Malmborg (Member—Department of State), Frank P. Reiche (Member—Federal Election Commission), and William H. Allen (Senior Fellow).

mittee on Interagency Coordination, aided by consultant Richard A. Merrill.

In Recommendation 82-6 the Conference calls on Congress to enact legislation that would substitute the United States as the sole defendant in all damage actions against executive branch officers and employees for violations of constitutional rights when such violations are committed by officers or employees who are acting within the scope of their office

or employment. The Conference recommends that such legislation permit the United States to assert as a defense any immunity or good faith defense currently available to the officers or employees. The recommendation also would place responsibility for investigation and discipline of an offending official with the agency that employs the official. Consultant Thomas J. Madden assisted the Committee on Administration with this project.

In Recommendation 82-7 the Conference sets forth factors the Conference believes Congress should consider in deciding whether to restrict the availability of judicial review of an agency rule to a limited period immediately subsequent to the issuance of the rule. The recommendation also states that, when Congress chooses to limit review, the limitations should ordinarily apply only to issues related to the rulemaking process or to the adequacy of record support for the rule, while other types of issues should remain open for review in enforcement proceedings. This recommendation was proposed by the Committee on Judicial Review, aided by consultant Paul Verkuil.

The Conference also adopted two statements in which the Assembly makes known its views with respect to proposals made elsewhere.

The statement, "Views of the Administrative Conference on Proposals Pending in Congress to Amend the Informal Rulemaking Provisions of the Administrative Procedure Act," presents the views of the body on several provisions of omnibus regulatory reform bills: H.R. 746, the Regulatory Procedure Act of 1982; and S. 1080, the Regulatory Reform Act. The Committee on Rulemaking, with the aid of a report prepared by Staff Attorney Michael W. Bowers, developed the statement.

The "Statement of the Administrative Conference on Discipline of Attorneys Practicing before Federal Agencies" expresses the view that any current problems arising from the discipline of attorneys by federal agencies are not of such magnitude or so widespread as to require legislative action or the adoption of uniform federal standards. The statement was proposed by the Committee on Governmental Processes. Consultant Michael Cox provided a background report to the Committee.

The Assembly also acted to amend the Conference's bylaws in several respects. The obligations of attendance by members at plenary sessions and at committee meetings were strengthened. In addition, a previous bylaw provision permitting not more than ten percent of the public members to serve more than three consecutive terms was replaced by a four-term limit for all public members. A new class of non-voting members, senior fellows, was established. Former chairmen of the Conference and members who have served eight or more years are eligible for appointment as senior fellows. Finally, the number and jurisdictions of the Conference's standing committees were revised. All amendments to the bylaws during 1982 are reflected in the bylaws set out in the back of this report.



Members concentrate on debate at the 25th Plenary Session. Above: in the lower tier, Stephen A. Sharp (Member—Federal Communications Commission), left, and Joseph F. Spaniol, Jr. (Liaison Representative—Administrative Office of the United States Courts); in the upper tier, Ronald E. Robertson (Public Member), left, and C.M. Butler III (Member—Federal Energy Regulatory Commission). Below: Public Members Richard A. Derham, left, and James S. Munn.

Texts of the recommendations and statements that were adopted during 1982 follow.

Recommendation 82-1: EXEMPTION (b)(4) OF THE FREEDOM OF INFORMATION ACT

(Adopted June 17, 1982)

The Freedom of Information Act (FOIA) allows public access to the records of federal agencies, whether such records are generated by the agencies or obtained by the agencies from other sources, including private individuals. Large numbers of FOIA requests are made by or on behalf of commercial interests seeking to utilize the government's processes to acquire information that has been prepared at the expense of private firms and individuals and submitted to the government as part of a study or pursuant to a regulatory requirement or other government information-gathering program. Often the privately submitted government records subject to FOIA disclosure contain information which will lose value to the submitter if it is disclosed. This availability of FOIA as a tool for low-cost commercial information-gathering—or, in some instances, industrial espionage—needs to be limited.

Exemption (b)(4) of FOIA permits agencies, as a matter of discretion, to withhold trade secrets and commercial or financial information obtained from a person which is privileged or confidential. Although FOIA contains procedural safeguards and a right of judicial review for requesters of agency records, the Act is silent regarding the rights of submitters of information whose legitimate interests may be impaired as a result of public disclosure of their information. Submitters are insecure about the degree of protection their information will receive when it is in the government's possession, and agency collection of private information may be hindered due to reluctance on the part of submitters to trust that the government will not disclose valuable documents.

While the Administrative Conference strongly endorses the FOIA concept of exposure of the government's activities, the disclosure of information created by private persons involves different values. Private needs and public access desires are in conflict in this limited area of FOIA disclosures. Congress should amend exemption (b)(4), both to insure that the private rights of submitters of information are adequately protected and to provide for a more efficient decisionmaking process within the government for disposing of claims regarding the applicability of exemption (b)(4).

Scope of the Exemption

Information deserving protected treatment under exemption (b)(4) has four characteristics. First, it is "private" information; the records

in the government's possession were created by a "person" and submitted to the government, rather than generated internally within an agency.* The information need not be "about" the submitter—an example is a submitter's analysis of market conditions in a market where the submitter does no business—but the information must be such that it is ordinarily considered to be the "property" of the submitter, i.e., except for the government's possession, the submitter has an exclusive right to dispose of the information.

Second, the information is, in the ordinary colloquial sense, "confidential". It is held by the government in confidence and is not already in the public domain as a result of lawful disclosure by the government or by others, nor is it required by law to be made public.

Third, the information will have value to the submitter that disclosure threatens to diminish. It should not be necessary for a submitter to prove that the value loss will be "substantial", or to demonstrate the precise manner in which persons receiving access to the information may use the information to cause injury to the submitter. Such requirements impose unreasonable burdens upon submitters, strain the capacity of the decisionmaking process, and do not produce predictable results. It should be enough that the submitter have a valuable interest in the information, and that disclosure may reasonably be expected to impair that interest. In this respect, due regard should be given both to the probability and to the magnitude of impairment; thus the greater the harm potentially resulting from disclosure, the less need a showing be made of the certainty of occurrence of the harm, and vice versa.

In addition to the traditional "commercial" and "financial" interests that may be jeopardized by the disclosure of confidential information, "business" information—a bit of commercially relevant information which alone appears insignificant but which, when combined with other bits, can reveal important business data—appropriately should come within exemption (b)(4). And "research" information, whether submitted by a commercial or non-commercial person, should be recognized to have value to the submitter and to be deserving of protection.

Fourth, the interests to be protected by (b)(4) must be "legitimate". The exemption should not be used to shield evidence of unlawful activities, fraud, waste, or government mismanagement. This condition is necessary to insure the availability of FOIA as an effective means of the public's oversight of government, while protecting those private interests that legitimately are not in the public domain.

* In an instance where one government agency submits analogous information to another agency, the information should be considered "private" for these purposes. A government entity that operates in a commercial, and perhaps highly competitive, marketplace will have interests of the same kind as if it were privately owned, and should receive similar protection.

Agencies currently have discretion, subject to the limitations of the Trade Secrets Act (18 U.S.C. 1905), to release a submitter's exempt (b)(4) information, even though disclosure might cause damage to the submitter. The Conference, believes, however, that valuable private information in the government's files should not be subject to release under FOIA, except where disclosure is necessary to prevent injury to an overriding public interest. This limited power of discretionary release should be exercised with caution, and agencies should conduct public interest inquiries only when a strong initial showing has been made that an adequate basis for discretionary disclosure is likely to exist.

Finally, the Conference proposes to clarify further the scope of agencies' discretion to disclose confidential information by amendment of the Trade Secrets Act to eliminate any potential conflict between the two acts and to establish FOIA as the statute controlling agency release of confidential information to a requester.

The Decisionmaking Process

Selecting administrative and judicial processes that will provide both fair and efficient resolution of particular controversies requires a careful examination of the institutional capabilities available for decisionmaking. A decision by the government whether to invoke exemption (b)(4) is not a typical agency program decision. In situations where a FOIA request involves contested (b)(4) information, agencies frequently act merely as stakeholders, and do not necessarily provide a proper forum for prompt and accurate decisionmaking. The matters to be decided often are outside the expertise of agency officials. For example, "impairment" of a protected interest could take the form of exposure of a secret manufacturing process, or it could be release of a consumer attitude survey that reveals the potential profitability of a new product, or it might involve disclosing the number of employees working on a particular assembly line where knowledge of the number could aid a competitor correctly to estimate manufacturing costs for the assembled product. Agency personnel most likely to be called upon to evaluate claims of exempt status will be program officials or FOIA officers, neither of which is likely to have a fundamental appreciation of the value of private information in the commercial marketplace.

The interests of requesters of information under FOIA, including possible (b)(4) information, have been and will continue to be best served by providing speedy informal agency action followed by a right of de novo judicial review of adverse agency decisions. Prudence and justice require that, when submitters become involved in a FOIA request, the procedures and standards of decisionmaking be the same as for cases involving requesters only.

Considering these factors, the Administrative Conference favors informal agency processes sufficient to prevent inadvertent releases of

exempt material to a requester, to join the issues adequately, and, when feasible, to provide a prompt resolution of disputes, coupled with rights for both submitters and requesters to obtain de novo review in the district courts of adverse agency decisions regarding the applicability of exemption (b)(4) to requested information.

The Conference stresses the importance of considering agency procedures in tandem with the scope of judicial review. In this recommendation, the Conference has taken care to match an informal agency process—i.e., one that does not result in the creation of a detailed agency record—with an opportunity for de novo judicial review unlimited in its scope to consider the matters at issue.

However, different factors apply to an agency determination to disclose, on the ground of preventing harm to an overriding public interest, information that is unquestionably exempt under (b)(4). In such an instance, the required balancing of interests—harm caused by non-disclosure against harm caused by disclosure—is more likely to result in the creation of a reviewable record. Here an agency may consider the public use to which the information will be put, as claimed by the requester, as well as all potential private uses of all users of the information, once it is disclosed. Balancing the public's needs against individual costs in this fashion involves matters appropriately committed to an agency's determination, and the Conference recommends that the scope of judicial review of an agency decision to disclose exempt (b)(4) information be limited to whether the agency action is "arbitrary or capricious".

The Conference rejected, after careful consideration, the possibility of creating a new judicial cause of action that would permit requesters to bring suit to compel an agency to release exempt (b)(4) information. At present requesters have no right to compel disclosure of information falling within any of the FOIA exemptions, and a rule to the contrary regarding exemption (b)(4) would likely be accompanied by great confusion regarding the status of confidential information (a problem sought to be eliminated by this recommendation), and could well result in a flood of new FOIA litigation.

At the agency level, fundamental fairness requires that submitters be given notice of an intended agency release of their information whenever there is a reasonable possibility that the information is covered by exemption (b)(4). Such a notice requirement should be included within FOIA. Agency information gathering and handling procedures vary greatly, however, and the details of providing notice are more appropriately determined by individual agencies through the rulemaking process. Further, there is such a wide variation in the types of information subject to the exemption, and in the criteria appropriate to establish a claim of exempt status, that each agency should give individual consideration to techniques that will best facilitate its own disposition of determinations under the exemption.

The additional procedural protections recommended here will require that the statutory time limits in FOIA be adjusted accordingly, at least for documents involving the (b)(4) exemption. While the Conference makes no recommendation with respect to specific intervals of time, the interests of prompt agency response and government credibility will require that more realistic limits be set by Congress.

Nothing in this recommendation is intended to diminish the ability of requesters, whose rights are established independently under FOIA, to obtain access to non-exempt agency records. Requesters would remain entitled to disclosure of privately submitted agency records absent a determination that (b)(4)—or some other exemption—applies. Where an agency does not assert a claim of exempt status for a submitter's information, the burden will be on the submitter to assert a right to exempt treatment, to demonstrate the applicability of the exemption, and to persuade the agency or judicial decisionmaker that the information should not be disclosed.

Recommendation

A. Scope of the Exemption

1. **Coverage.** Congress should amend exemption (b)(4) of FOIA to provide that the exemption applies to confidential information submitted to the government by a person and for which disclosure may reasonably be expected to impair the legitimate commercial, financial, business, or research interests of that person. (This recommendation is not intended to affect other laws that control the disclosure of specific agency records.)

2. **Discretion to Disclose.** The Act should be amended to eliminate agency discretion to disclose exempt (b)(4) information to a requester, except that agencies should be permitted to disclose otherwise exempt (b)(4) information (i) when the submitter agrees to waive exempt status, or (ii) when the agency finds that to withhold the information would injure an overriding public interest. To eliminate confusion caused by the interrelation of FOIA and the Trade Secrets Act (18 U.S.C. 1905) Congress should amend the Trade Secrets Act to make clear that it does not authorize withholding under exemption (b)(3) of FOIA and does not inhibit discretionary disclosure of material under exemption (b)(4).

B. Agency Procedures

1. **Notice.** Congress should amend FOIA to require that, prior to a final agency decision to disclose to a requester information that may fall within exemption (b)(4), the agency provide the submitter with notice adequate to permit the submitter to object to the disclosure. This amendment should also require that agencies specify by rule those instances

in which a submitter is entitled to notice, the rules to include, at a minimum, instances in which, for the particular information requested, the submitter (i) has made a prior claim of exempt (b)(4) status, or (ii) had submitted the information under a promise of confidentiality, of (b)(4) treatment, or of notice of a FOIA request. In addition, agencies should consider whether, in some instances, it would be appropriate routinely to give notice to submitters of all requests for the submitters' data, so that the agencies will always have the benefit of the submitters' opinions on the applicability of (b)(4).

2. *Agency Information Handling Procedures.* Agencies should encourage the use of pre-marking by submitters to aid in the identification of materials that may be subject to exemption (b)(4). Congress should amend FOIA to authorize each agency to determine, by rule, whether pre-marking should be made a pre-condition for notice of pending disclosure; such rules should be based on a consideration of the nature of information subject to (b)(4) as well as the characteristics of those who submit it. Agencies should investigate whether certain routinely collected categories of information may appropriately be designated by rule as ordinarily subject to disclosure without notice, or ordinarily subject to withholding under exemption (b)(4); an agency using categories established by rules must bear in mind that such rules, which may greatly facilitate the handling of large volumes of requests in some cases, cannot override the FOIA itself and must provide that, prior to making a final decision on disclosure, the agency will, upon specific request, review particular documents to determine their exempt status. Agencies that handle large volumes of requests for information likely to contain (b)(4) exempt material should consider establishing, by rule, the nature of substantiation that would ordinarily be required to support a claim of exempt (b)(4) status.

3. *Determination of Exempt Status.* Congress should amend FOIA to provide for written objections by a submitter in instances of contested (b)(4) determinations. In making determinations on the applicability of exemption (b)(4), agencies should use informal techniques, and should avoid utilizing time-consuming adversarial methods. During the decisionmaking process, agencies must be sensitive to the special problems of both submitters and requesters. Agency procedures must not disclose to a requester the basis of a claim of exempt status when disclosure of the basis itself would compromise the confidentiality of the information. On the other hand, agencies should bear in mind that a requester does not ordinarily have access to such information as may be necessary to challenge a submitter's claim of exempt status. In order to facilitate informal agency resolution of potential conflicts between requesters and submitters, agencies should provide that, whenever possible, a requester receive and be permitted to comment upon a submitter's written objections to release, and be permitted to be present at oral hearings,

if any, on the subject, as long as this does not compromise the confidentiality of the information.

4. ***Discretionary Release of Exempt Information.*** Once information has been determined to be exempt under (b)(4), a FOIA requester desiring to obtain disclosure of the information on the ground that non-disclosure would injure an overriding public interest should bear a heavy burden to demonstrate with specificity the basis for the request. A pro forma assertion of public injury due to non-disclosure should not be sufficient to trigger an agency inquiry. In considering whether to exercise its limited discretion to disclose otherwise exempt (b)(4) material, an agency appropriately may consider all potential uses to which the disclosed information may be put, and should balance any probable public harm in non-disclosure against probable harm to the submitter, the government, and others due to disclosure.

5. ***Final Decision to Disclose.*** Congress should amend FOIA to provide that a final agency decision to disclose information alleged by the submitter to be exempt under exemption (b)(4) be made by an agency official of a rank equivalent to that of the agency official authorized to deny a request for disclosure. Agencies should consider utilizing the same appeal process within the agency for submitter-contested cases as that used whenever a requester challenges a decision not to disclose.

6. ***Agency Implementation.*** Pending congressional enactment of the changes recommended herein, agencies should, to the extent permitted by law, immediately adopt all of the above proposals for improved agency procedures.

C. Judicial Review

1. ***Cause of Action.*** Congress should amend FOIA to provide that both submitters and requesters of a contested piece of (b)(4) information have a cause of action under FOIA, that each may intervene in suits brought by the other, and that opposing claims of submitter and requester can be resolved in a single forum.

2. ***Scope of Review.*** Congress should amend FOIA to provide that agency determinations regarding the applicability of exemption (b)(4) be subject to de novo consideration by the courts. Agency decisions to release exempt information, on the ground that non-disclosure would injure an overriding public interest, should be made reviewable at the instance of submitters of the information under the "arbitrary or capricious" standard in 5 U.S.C. 706(2)(A).

**Recommendation 82-2: RESOLVING DISPUTES
UNDER FEDERAL GRANT PROGRAMS**
(Adopted June 17, 1982)

Federal grants to governments, public service institutions and other non-profit organizations have been conspicuous instruments of federal policy since the 1930's. During the past two decades the growth in the number of federal grant programs, and the level of resources distributed through grants, has evidenced the expanded influence of the federal government on the activities of these entities.

Ensuring proper conduct of federal assistance programs has assumed increasing importance as these extraordinarily varied programs have proliferated. Federal domestic grant spending, which now exceeds \$100 billion annually, promotes major social goals. Grants, and the activities they assist, often are crucial to beneficiaries whom Congress intends to aid and to recipients who carry out program goals. For instance, over one-quarter of all expenditures by state and local governments now come from federal grants, and thousands of smaller institutions depend on these funds for their very existence.

Each of these grants represents an understanding on the part of the federal government and the grantee that is in the nature of a contractual commitment. The number and intensity of disputes over grants have risen in recent years, following both the increased reliance on federal grants by other institutions and a growing federal budget stringency that has decreased the generosity of federal funding and increased the rigor of audit review. These disputes run the gamut from those that involve nearly pure questions of federal policy and agency discretion to those that affect substantial grantee expectations or involve particularized adverse determinations about individuals.

Disputes may arise initially over the making or withholding of a grant, the amount of funds committed, or the terms and conditions imposed. Once the grantee has undertaken the project, controversies may occur over what actions the grantee has been funded or authorized to take, the grantee's relationships with program beneficiaries, subgrantees, or subcontractors, and other incidents of ongoing project administration, including grantee compliance with the terms and conditions of the grant. Disputes may arise in the form of audit disallowances. Finally, an agency may choose to terminate or debar a grantee or refuse to provide continued funding based on the agency's belief about the adequacy of a grantee's performance of previous projects.

In prior recommendations, the Administrative Conference has called on all federal grantmaking agencies to adopt informal procedures for hearing and resolving complaints by the public that a recipient's administration of a grant fails to meet federal standards (Recommendations 71-9 and 74-2). While some agencies have carried out these recommendations, many still do not afford grantees or other persons

affected by the operation of federal domestic grant programs any channels for impartial consideration of their complaints. Congress has provided few directives in this area, except as to a few agencies like the Departments of Education and Labor, and actual agency practices in handling grant disputes have varied considerably.

This recommendation goes beyond the Conference's prior statements to focus on the rights that agencies should provide to grantees and applicants for grant funds. Few agencies afforded grant recipients any substantial appeal rights until the mid-1970's; some still fail to do so. In recent years, several agencies have begun to create processes to resolve some types of disputes with grantees and certain types of grant applicants. Their experience indicates that these appeal procedures, while sometimes flawed, have been useful for protecting grantees' rights and for helping agencies to avert needless and troublesome litigation, improve oversight of significant administrative problems, ensure that policies are applied fairly and consistently, and make decisions on a rational, justifiable basis.

Given the importance of these programs, the nature of the interests involved, public policy factors, and considerations of fairness enunciated in recent constitutional decisions, the Administrative Conference believes that all grantmaking agencies should maintain procedures to hear appeals regarding certain kinds of agency actions. For example, grantees generally have a special interest in debarment, termination, suspension, or certain kinds of renewal or entitlement situations. Also, disputes regarding some expenditure disallowances arising from audits, or other cost and cost rate determinations, may be crucial to a grantee, requiring payback of large sums. Because of the potential significance of these types of actions, and their relative infrequency, agencies should establish appeals procedures for them. On the other hand, thousands of applications for competitive discretionary grants are denied each year, and the imposition of any broad appeal hearing requirement for this type of action could be quite burdensome to some agencies.

While the variety and complexity of federal domestic grant programs (and grant disputes) ultimately render uniform procedural prescriptions inappropriate, this recommendation sets forth some general considerations that agencies should find useful to guide them in assessing the adequacy of their present methods of resolving grant appeals. The Conference believes that an agency should have considerable latitude to tailor procedures to the characteristics of its programs and grantees, and in the great bulk of appeals agencies need not match the protections required in adjudications governed by the Administrative Procedure Act, 5 U.S.C. 554-557. The recommendation begins with, and centers on, the notion that informal action—including opportunities for conversations with relevant program officials and their superiors, mediation or ombudsman services, and similar devices—should form the core of the resolution process. Still, agencies should be aware that at least some

disputes may arise, especially in post-award cases involving contested issues with substantial funds at stake, in which some kind of more formal agency review should be made available.

In making this recommendation, the Conference is aware that some agencies maintain appeal procedures which are more elaborate than those described below but provide equal or greater safeguards and protective measures. This recommendation is not intended to cast any doubt on the propriety of such procedures, or to assess the need therefor in light of specific programs or agency goals and concerns.

Recommendation

I. Scope and Intent of the Recommendations

The recommendations in Part II concern procedures for disputes involving domestic "grantees" and "vested applicants." A "grantee" may be a non-profit or community service organization, a unit of state or local government, a school, corporation or an individual who has executed a grant agreement or cooperative agreement with a federal agency. A "vested applicant" is one who is entitled by statute to receive funds, provided the applicant meets certain minimal requirements; or one who applies for a noncompetitive continuation grant, and has been designated in some manner as the service deliverer for a designated area or is operating within a designated multi-year project period. Part III deals with agency-level processes for handling complaints by disappointed applicants for discretionary grant funds. The procedures recommended herein are not intended to displace existing hearing mechanisms already required by law in some programs. They apply only to grant programs carried on primarily within the United States.

II. Complaints by Grantees and Vested Applicants

A. Informal review and dispute resolution procedures

1. Each federal grantmaking agency should provide informal procedures under which the agency may attempt to review and resolve complaints by grantees and vested applicants without resort to formal, adjudicatory procedures. The informal procedure could take several forms, including, for example, advance notice of adverse action and the reasons for the action, opportunity to meet with the federal officials involved in the dispute, review by another or higher-level agency official, or use of an ombudsman or mediator. Attempts to resolve disputes under these informal procedures should be pursued expeditiously by the agency within a definite time frame. Notwithstanding these time limits, a complainant's invocation of more formal appeal procedures should not prevent further efforts to settle, mediate, or otherwise resolve the dispute informally.

2. The existence of informal review procedures should be made known to affected grantees and vested applicants in the manner described in paragraphs 3 and 12, below. Agencies should encourage their program and decisional officials to resolve grievances informally, and provide training to improve their abilities to do so. In undertaking such training, agencies should work with those agencies that already have begun to make use of mediation and other conciliatory approaches, such as the Departmental Grant Appeals Board in the Department of Health and Human Services, and existing groups with expertise in these methods of dispute resolution.

B. Notice of agency action

3. Upon issuance of an agency decision which (if not appealed) represents final agency action, each grantmaking agency should provide prompt notice of its action to the affected grantee or vested applicant. If the action is adverse to a grantee or vested applicant, the agency's notice, at a minimum, should provide a brief statement of the legal or factual basis for the action; state the nature of any sanctions to be imposed; and describe any available appeal procedures, including applicable deadlines and the name and address of the agency official to be contacted in the initial stages of an appeal.

C. Administrative appeal procedures

4. Each federal grantmaking agency should provide the additional opportunity for some type of administrative appeal in at least certain kinds of grant-related disputes. This appeal may be conducted orally or in writing, depending on the nature of the dispute, and may be expedited where appropriate. In determining whether an administrative appeal should be afforded and the form of any such appeal for particular classes of disputes, agencies should consider the probable impact of the adverse action on the complainant, the importance of procedural safeguards to accurate decisionmaking in each class of dispute, the probable nature and complexity of the factual and legal issues, the financial and administrative burden that would be imposed upon the agency, the need for a perception of the government's fairness in dealing with grantees and vested applicants, and the usefulness of appeal procedures to give feedback on administrative problems.

5. In light of the factors described in paragraph 4, each federal grantmaking agency should provide the opportunity for some kind of administrative appeal with regard to adverse actions involving:

- a. the performance of an existing grant, including disputes involving debarment, termination, suspension, voiding of a grant agreement, cost disallowances, denials of cost authorizations, and cost rate determinations;
- b. the denial of funding to applicants for entitlement grants, including disputes involving the applicant's eligibility, amount of

- funding to be received, and application of award criteria or pre-established review procedures; and
- c. the denial of applications for noncompetitive continuation awards where the denial is for failure to comply with the terms of a previous award.
6. Where an opportunity for an administrative appeal is afforded, the agency should take into account the factors set forth in paragraph 4 and select from among the following forms of proceedings to provide the one most appropriate to the particular case:
- a. decision based on written submissions only;
 - b. decision based on oral presentations;
 - c. decision on written submissions plus an informal conference or oral presentation; or
 - d. full evidentiary hearing.

Where a hearing or conference is useful to resolve certain issues, the agency may limit the hearing to those issues and treat remaining questions less formally. In addition, the agency should provide some form of discretionary expedited appeal process for disputes. In such proceedings, the agency may, for example, shorten time deadlines, curtail record requirements, or simplify procedures for oral or written presentations.

7. At a minimum, these administrative appeal procedures should afford grantees and vested applicants the following:
- a. written notice of the adverse decision (see paragraphs 3 and 12);
 - b. an impartial decisionmaker (for instance, a grant appeals board member, a high level agency official, a person from outside the agency, an administrative law judge, or certain other agency personnel from outside the program office) with authority to conduct the proceedings in a timely and orderly fashion;
 - c. opportunity for the agency, complainant, and any other parties to the appeal promptly to obtain information from each other, and to present and rebut significant evidence and arguments;
 - d. development of a record sufficient to reflect accurately all significant factual submissions to the decisionmaker and provide a basis for a fair decision; and
 - e. prompt issuance of a written decision stating briefly the underlying factual and legal basis.
8. Each federal grantmaking agency should determine in advance, and specify by rule or order, the scope of the authority delegated to the decisionmaker in administrative appeals. For example, agencies should specify in advance whether the decisionmaker has the authority to review the validity of agency regulations or the consistency of agency actions with governing statutes.
9. Agencies should accord finality to the appeal decision, unless further review is conducted promptly pursuant to narrowly drawn exceptions and in accordance with preestablished procedures, criteria, and

standards of review. If the decisionmaker is delegated, or asserts, authority to review the validity of agency regulations, the agency head should retain an option for prompt final review of the decision in accordance with applicable procedures.

10. Once these administrative appeal procedures are invoked, the decisionmaker should discourage all *ex parte* communications on the appeal unless the parties consent to such communications. Any *ex parte* communications that do occur should be disclosed promptly, and placed in the appeal record.

11. Agencies should encourage prompt decision of appeals by creating time limits or other guidelines for processing grant disputes, and should pay particular attention to resolving appeals over decisions regarding renewal and continuation grants in a timely manner. These timetables might be fixed generically or in accordance with the complexity of particular cases. Decisionmakers' compliance should be monitored by the agency pursuant to a regular caseload management system.

D. Public notice

12. Grantmaking agencies should give advance notice and afford an opportunity for public comment in developing informal review and administrative appeal procedures. Agencies should ensure that available procedures are made known to grantees and vested applicants. Notice of such procedures should be published in the *Federal Register*, codified in the *Code of Federal Regulations*, and included in grant agreements and other appropriate documents, in addition to the individual notice described in paragraph 3.

13. Agencies should collect in a central location, and index, those written decisions made in administrative appeals. These decisions should be made available to the public except to the extent that their disclosure is prohibited by law. Whenever a grantee or vested applicant cites a previous written decision as a precedent for the agency to follow in its case, the agency should either do so, distinguish the two cases, or explain its reasons for not following the prior decision.

III. Complaints by Discretionary Grant Applicants

A. Informal review procedures

The Conference previously has called on agencies to develop criteria for judging discretionary grant applications and to adopt at least informal complaint mechanisms to ensure compliance with these criteria and other federal standards. (See Recommendations 71-9 and 74-2.) The Conference reiterates its belief that these procedures can benefit agency performance.

B. Public notice

Each federal grantmaking agency should ensure that available informal review procedures and administrative appeal procedures are made known to grant applicants. Notice of such procedures should be published in the *Federal Register*, codified in the *Code of Federal Regulations*, and included in application materials and other appropriate documents. (See also Recommendations 71-4 and 71-9.)

IV. Implementation of Recommendation

Each federal grantmaking agency should, within one year of the adoption of this recommendation, report in writing to the Administrative Conference the steps the agency intends to take, consistent with the above guidelines, to improve its dispute resolution process.

Recommendation 82-3: FEDERAL VENUE PROVISIONS APPLICABLE TO SUITS AGAINST THE GOVERNMENT

(Adopted June 18, 1982)

(a) This recommendation responds to proposals to amend statutes that govern venue in actions against the United States, its agencies, and its officials. It calls for two limited changes: (1) amendment of the district court transfer provision, 28 U.S.C. 1404(a), to provide explicitly that intervenors may request a change of venue, and (2) addition of a provision requiring that, when an action against the government is brought in the District Court for the District of Columbia that may have a particular impact on residents of one or more states, notice be given to the attorneys general of any such states. Otherwise, it urges rejection of proposals to make the extent of local impact determinative of proper venue.

(b) The present venue statute governing most district court actions against the United States, its officers, or agencies is 28 U.S.C. 1391(e). Section 1391(e) permits suit in any district in which (1) a defendant resides, (2) the cause of action arose, (3) real property involved in the action is situated, or (4) the plaintiff resides, if no real property is involved. Under 28 U.S.C. 1404(a) a district court may transfer any civil action or any other district where it might have been brought "[f]or the convenience of parties and witnesses, in the interest of justice"

(c) The present venue requirements governing agency review proceedings in the courts of appeals are found in particular statutes, generally a section of the substantive statute under which the agency is acting. Most such statutes include the District of Columbia Circuit as

one of the available forums; some statutes designate that circuit as the exclusive forum.*

(d) Section 1391(e) applies to all sorts of actions, including actions for money damages. The concern of those making the current proposals is not with damage actions but with nonstatutory review proceedings, typically actions for declaratory judgments, injunctions, or mandamus. More particularly their concern is with only some of those cases, often environmental cases, that involve projects, people, or resources of particular states or regions.

(e) Those advocating modifications of the venue laws believe that too many of such "local" suits against the government are heard in the courts of the District of Columbia and that the judges of those courts do not have the "feel" for local affairs that judges on the scene have. Proponents are mostly from the western states, and they emphasize how different are the arid, relatively undeveloped West and its problems from the East and its problems. They argue that the convenience of locally affected citizens and their perception that distant district judges are out of touch with local concerns should be important factors in determining venue. Therefore, they propose amending Sections 1391 and 1404 to limit venue to the judicial district in which the residents would be most affected by the agency action or inaction that is the subject of the lawsuit. Similarly, they propose new statutory provisions governing court of appeals venue that would create new rights to obtain transfers to a circuit in which the impact of the suit is greater and would also eliminate all provisions for exclusive review in the District of Columbia Circuit.

(f) Across the board attempts to restrict the choice of forum presented by the current venue laws are unnecessary and unwise. The number of suits against the government filed in the District of Columbia has not been disproportionate, and we believe that such suits have been transferred when appropriate. The current flexible venue statutes minimize threshold litigation, whereas the proposed modifications would involve costly preliminary determinations concerning the substantiality and location of impact. Many, probably most, of the cases with which the proposals are concerned are heard on agency records without the taking of testimony. Considerations of convenience to the parties (which in such cases really means counsel) and of the location of the agency record often favor venue in the District of Columbia. Changes of venue may be obtained under 28 U.S.C. 1404, which provides that transfers to an alternate forum may be obtained "for the convenience of parties and

* ACUS has previously addressed the advisability of direct review in the courts of appeals in Recommendation 75-3 (choice of forum for judicial review of administrative action). Court of appeals venue provisions in the Clean Air Act and Federal Water Pollution Control Act were addressed in Recommendation 76-4 (national standards should be reviewed exclusively in the D.C. Circuit; rules affecting single states or facilities should be reviewed in the local circuit). "Races" to the courts of appeals were addressed in Recommendation 80-5.

witnesses, in the interest of justice." Where the convenience of locally based parties or witnesses is a significant consideration, or the interests of justice otherwise indicate that the case should be tried in the local jurisdiction, courts have appropriately permitted transfer. There is no suggestion that intervention is not allowed when requested. To ensure that affected persons are aware of suits filed in the District of Columbia, a simple notice requirement is all that is needed. Furthermore, to remove any doubt that intervenors may request a change of venue, explicit language to that effect can be added to 28 U.S.C. 1404.

(g) With respect to venue in the courts of appeals, the need for authoritative determinations on nationally applicable statutes or regulations may argue for exclusive review in the District of Columbia Circuit. (See Recommendation 76-4: Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act.) However, Congress should review all such existing provisions to decide on a statute-by-statute basis whether such exclusivity is warranted.

(h) There is no question that some proponents of changes in the venue laws believe that the place of hearing is likely to affect the outcome and believe further that courts of "local" districts will be more sympathetic than the courts of the District of Columbia to the local interests for which they profess to speak. No doubt, some of the opponents of such changes perceive an advantage to their interests in their ability to sue in the District of Columbia.

The Conference is aware from its consideration of the race to the courthouse recommendation (Recommendation 80-5) that lawyers do act on perceptions of advantage based on venue even within a single United States court system and a single body of federal law. The Conference cannot deny the existence or the importance of the perception of advantage to a party from the choice of one court over another. We suggest, however, that, to the extent that the concern of proponents is actually with the terms and construction of certain federal statutes, the proper objective should be the forthright amendment of the statutes, not manipulation of the law of venue in order to achieve more favorable construction.

Traditionally, one has been able to sue the government at its seat. Indeed, it took the mandamus and venue statute of 1962, which added section 1391(e) to the Code, to provide a solid basis for suing the government elsewhere. Perceived differences in the predilections of particular courts, which are likely to be transient if they exist at all, are not a reason for departing from our tradition.

There may be particular statutory contexts in which local considerations are so likely to predominate in a certain category of suits against the government, that such suits should be heard in local districts. Thus, while this recommendation opposes across the board restrictions on venue choices, the Conference does not oppose the reexamination of the

allowable venue of proceedings to review agency actions under particular statutes.

Recommendation

(1) Congress should not amend the statutes governing venue in district court actions against the United States, its agencies, or its officials, 28 U.S.C. 1391(e), 1404(a), or the statute governing direct review of agency orders in the courts of appeals, 28 U.S.C. 2112(a), to make the extent of local impact determinative of proper venue.

(2) Congress should add a new subsection (g) to 28 U.S.C. 1391 to provide that plaintiffs filing actions in the United States District Court for the District of Columbia against the United States, its agencies, or its officials that may have a particular impact on the residents of other districts be required to notify the attorneys general of the states containing such districts.

(3) Congress should amend the district court transfer provision, 28 U.S.C. 1404(a), to provide explicitly that intervenors may request a transfer.

(4) Congress should review existing statutes providing for review of federal agency orders or regulations exclusively in the District of Columbia Circuit to ensure that, in each statute, considerations of the need for authoritative determinations on nationally applicable requirements outweigh the benefits of providing litigants with a choice of forums for challenging agency action. Pending such a review, however, Congress should not enact legislation overriding all exclusive venue provisions.

**Separate Statement of Members Barnes, C. M. Butler III,
D'Agostino, Fowler, Hakola, Horowitz, Knapp, Matheson,
Miller, Morris, Oliver, Pressly, Rose, Sasseville, Schmults,
Loren A. Smith, Tidwell, Twine, Williamson, and
Liaison Representative Ferguson**

We oppose that portion of the recommendation which rejects local impact as a factor in determining proper venue. In our view, consideration of local impact is germane to determining the proper venue of a suit, and a motion to amend the recommendation to provide for the consideration of local impact in the transfer of venue statute (28 U.S.C. 1404(a)) failed at the plenary session by only two votes. While we disagree with the Conference's recommendation on this issue, we join in the Conference's endorsement of related legislation to require that notice be given to the attorney general of any state containing districts that may be impacted by pending litigation against the United States and to expand 28 U.S.C. 1404(a) to permit an intervenor to request a transfer.

Our belief that local impact ought to be a significant factor in locating federal litigation is grounded in the basic principle that justice is more

likely to be achieved when its search is conducted close to the people most affected by the outcome of the proceedings. This is a vast country with people proud of the freedom that unites us, and possessed of a determined commitment to the uniqueness of where they live. The people in the West or the South do not want different law than the rest of the country; they do seek judgment by men and women who adjudicate as neighbors, who bring the wisdom of place and experience to their deliberations. Returning venue to judicial districts whose citizens are affected by litigation does not guarantee certain results; it does guarantee that affected citizens will more likely perceive the judicial process as fair and responsive to their interests.

During the debate supporters of the recommendation claimed to be disturbed at the renascent provincialism they linked with the venue changing proposals. We do not believe that the merit of the local impact issue should be obscured by dismissing its proponents as provincial, or observing, as does the preamble, that those who favor venue changing legislation are from the "arid, relatively undeveloped West." Indeed, one could as easily speculate that those who would do all in their power to keep the locus of federal judicial decisionmaking in the District of Columbia are motivated by "provincial" concerns such as protecting the turf of the D.C. bar which might be threatened by enactment of venue changing proposals. Rather, the issue as we see it is whether the people's opportunity to participate in and observe the litigation which will affect their lives deserves to be balanced against other interests of the parties. We think it does.

While the recommendation's preamble does not explore the substantive concerns raised above, it does hypothesize some consequences of venue changing proposals such as the possibility of added pre-trial expenses necessitated by additional venue challenges and an observation that any changes will not improve the present situation since most suits are transferred where appropriate. We disagree with these conclusions. Cases where venue did not coincide with substantial local impacts and ones where transfer requests were denied are referred to in Senator Laxalt's and Linden Kettlewell's article "A Return to Traditional Considerations for Determining Venue," at pp. 17-18, *Venue At The Crossroads*, February 1982, National Legal Center for the Public Interest. Even an opponent of the pending S. 2419 to amend the basic venue statute—Nicholas C. Yost, also a contributor to *Venue At The Crossroads*—concedes that transfers from Washington to affected localities have been denied in some specific instances. (*Id.* at p. 45.)

It is also not readily apparent how venue challenges will prolong litigation or significantly increase costs. Normal pre-trial procedures can resolve venue challenges expeditiously, and appeals to venue decisions must be made immediately and through writs of mandamus. Since decisions on venue under section 1404(a) are to the court's sound discretion, it would be most unusual to find many such decisions reversed.

Since the pending venue changing legislation seeks to strike a balance between considerations of substantial local impact and other "interests of justice," the recommendation's admonishment that "local impact" considerations not be determinative unfortunately fails to confront the present proposals or state of congressional debate. In dissenting from the recommendation's failure to approve local impact as an appropriate consideration in establishing proper venue, we hope that Congress will proceed to favorable consideration of S. 2419 and the principles it advances. We believe, with the sponsors of S. 2419, that justice is well served when it is conducted closest to those citizens substantially affected by the court's decision.

Separate Statement of R. Tenney Johnson

I join members Barnes, *et al.*, in dissenting from this recommendation as it is presently drafted, but for reasons that to some extent differ. While I agree that Congress should not amend the law to make local impact *determinative* of proper venue, I do not agree that a plaintiff should be required to notify attorneys general of states in which an action may have a particular impact. Such a requirement, because of its vague parameters, would quickly lead to giving notice to all fifty attorneys general in every case.

More importantly, I believe that local impact should be a *possible* basis for transfer of venue, just as the convenience of the parties or witnesses currently is a basis for, but not determinative of, such a transfer. In other words, the decision should still be left to the court's discretion, but the law should provide that consideration of the local nature of the action's impacts is appropriate in reaching a decision.

I cannot, on the other hand, explicitly endorse S. 2419's venue provisions, since it would *prohibit* venue in the district where the defendant or plaintiff resides unless the action would substantially affect the residents of that district, and thus would not permit the balancing of local interests with other interests.

Recommendation 82-4: PROCEDURES FOR NEGOTIATING PROPOSED REGULATIONS

(Adopted June 18, 1982)

The complexity of government regulation has increased greatly compared to that which existed when the Administrative Procedure Act was enacted, and this complexity has been accompanied by a formalization of the rulemaking process beyond the brief, expeditious notice and comment procedures envisioned by section 553 of the APA. Procedures in addition to notice and comment may, in some instances, provide important safeguards against arbitrary or capricious decisions by agencies and help ensure that agencies develop sound factual bases

for the exercise of the discretion entrusted them by Congress, but the increased formalization of the rulemaking process has also had adverse consequences. The participants, including the agency, tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions. Because of the adversarial relationships, participants often do not focus on creative solutions to problems, ranking of the issues involved in a rulemaking, or the important details involved in a rule. Extensive factual records are often developed beyond what is necessary. Long periods of delay result, and participation in rulemaking proceedings can become needlessly expensive. Moreover, many participants perceive their roles in the rulemaking proceeding more as positioning themselves for the subsequent judicial review than as contributing to a solution on the merits at the administrative level. Finally, many participants remain dissatisfied with the policy judgments made at the outcome of rulemaking proceedings.

Participants in rulemaking rarely meet as a group with each other and with the agency to communicate their respective views so that each can react directly to the concerns and positions of the others in an effort to resolve conflicts. Experience indicates that if the parties in interest were to work together to negotiate the text of a proposed rule, they might be able in some circumstances to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute. For example, highly technical standards are negotiated that have extensive health, safety, and economic effects; lawsuits challenging rules are regularly settled by agreement on a negotiated rule; public law litigation involves sensitive negotiation over rule-like issues; and many environmental disputes and policies have been successfully negotiated. These experiences can be drawn upon in certain rulemaking contexts to provide procedures by which affected interests and the agency might participate directly in the development of the text of a proposed rule through negotiation and mediation.

The Federal Advisory Committee Act (FACA) has, however, dampened administrative enthusiasm for attempts to build on experience with successful negotiations. Without proposing a general revision of FACA, the Administrative Conference urges that Congress amend the Act to facilitate the use of the negotiating procedures contemplated in this recommendation.

The suggested procedures provide a mechanism by which the benefits of negotiation could be achieved while providing appropriate safeguards to ensure that affected interests have the opportunity to participate, that the resulting rule is within the discretion delegated by Congress, and that it is not arbitrary or capricious. The premise of the recommendation is that provision of opportunities and incentives to resolve

issues during rulemaking, through negotiations, will result in an improved process and better rules. Such rules would likely be more acceptable to affected interests because of their participation in the negotiations. The purpose of this recommendation is to establish a supplemental rulemaking procedure that can be used in appropriate circumstances to permit the direct participation of affected interests in the development of proposed rules. This procedure should be viewed as experimental, and should be reviewed after it has been used a reasonable number of times.

Recommendation

1. Agencies should consider using regulatory negotiation, as described in this recommendation, as a means of drafting for agency consideration the text of a proposed regulation. A proposal to establish a regulatory negotiating group could be made either by the agency (for example, in an advance notice of proposed rulemaking) or by the suggestion of any interested person.

2. Congress should facilitate the regulatory negotiation process by passing legislation explicitly authorizing agencies to conduct rulemaking proceedings in the manner described in this recommendation. This authority, to the extent that it enlarges existing agency rulemaking authority, should be viewed as an experiment in improving rulemaking procedures. Accordingly, the legislation should contain a sunset provision. The legislation should provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings, as contemplated in this recommendation, free of the restrictions of the Federal Advisory Committee Act and any ex parte limitations. Legislation should provide that information tendered to such groups, operating in the manner proposed, should not be considered an agency record under the Freedom of Information Act.

3. In legislation authorizing regulatory negotiation, Congress should authorize agencies to designate a "convenor" to organize the negotiations in a particular proceeding. The convenor should be an individual, government agency, or private organization, neutral with respect to the regulatory policy issues under consideration. If the agency chooses an individual who is an employee of the agency itself, that person should not be associated with either the rulemaking or enforcement staff. The convenor would be responsible for (i) advising the agency as to whether, in a given proceeding, regulatory negotiation is feasible and is likely to be conducive to the fairer and more efficient conduct of the agency's regulatory program, and (ii) determining, in consultation with the agency, who should participate in the negotiations.

4. An agency considering use of regulatory negotiation should select and consult with a convenor at the earliest practicable time about the feasibility of its use. The convenor should conduct a preliminary inquiry

to determine whether a regulatory negotiating group should be empanelled to develop a proposed rule relating to the particular topic. The convenor should consider the risks that negotiation procedures would increase the likelihood of a consensus proposal that would limit output, raise prices, restrict entry, or otherwise establish or support unreasonable restraints on competition. Other factors bearing on this decision include the following:

(a) The issues to be raised in the proceeding should be mature and ripe for decision. Ideally, there should be some deadline for issuing the rule, so that a decision on a rule is inevitable within a relatively fixed time frame. The agency may also impose a deadline on the negotiations.

(b) The resolution of issues should not be such as to require participants in negotiations to compromise their fundamental tenets, since it is unlikely that agreement will be reached in such circumstances. Rather, issues involving such fundamental tenets should already have been determined, or not be crucial to the resolution of the issues involved in writing the proposed regulation.

(c) The interests significantly affected should be such that individuals can be selected who will adequately represent those interests. Since negotiations cannot generally be conducted with a large number of participants, there should be a limited number of interests that will be significantly affected by the rule and therefore represented in the negotiations. A rule of thumb might be that negotiations should ordinarily involve no more than 15 participants.

(d) There should be a number of diverse issues that the participants can rank according to their own priorities and on which they might reach agreement by attempting to optimize the return to all the participants.

(e) No single interest should be able to dominate the negotiations. The agency's representative in the negotiations will not be deemed to possess this power solely by virtue of the agency's ultimate power to promulgate the final rule.

(f) The participants in the negotiations should be willing to negotiate in good faith to draft a proposed rule.

(g) The agency should be willing to designate an appropriate staff member to participate as the agency's representative, but the representative should make clear to the other participants that he or she cannot bind the agency.

5. If the convenor determines that regulatory negotiation would be appropriate, it would recommend this procedure to the agency. If the agency and the convenor agree that regulatory negotiation is appropriate, the convenor should be responsible for determining preliminarily the interests that will likely be substantially affected by a proposed rule, the individuals who will represent those interests in negotiations, the scope of issues to be addressed, and a schedule for completing the work. It will be important for potential participants to agree among themselves as to these matters, and their agreement can be facilitated by either

the convenor or a possible participant conducting a preliminary inquiry among identified interests. Reasonable efforts should be made to secure a balanced group in which no interest has more than a third of the members and each representative is technically qualified to address the issues presented, or has access to qualified individuals.

6. The subject matter of the proposed regulation may be within the jurisdiction of an existing committee of a non-governmental standards writing organization that has procedures to ensure the fair representation of the respective interests and a process for determining whether the decision actually reflects a consensus among them. If such a committee exists and appears to enjoy the support and confidence of the affected interests, the convenor should consider recommending that negotiations be conducted under that committee's auspices instead of establishing an entirely new framework for negotiations. In such a case, the existing committee could be regarded as a regulatory negotiation group for purposes of this recommendation. (Alternatively, the product of the committee could be used as the basis of a proposed regulation pursuant to Administrative Conference Recommendation 78-4.*)

7. To ensure that the appropriate interests have been identified and have had the opportunity to be represented in the negotiating group, the agency should publish in the *Federal Register* a notice that it is contemplating developing a rule by negotiation and indicate in the notice the issues involved and the participants and interests already identified. If an additional person or interest petitions for membership or representation in the negotiating group, the convenor, in consultation with the agency, should determine (i) whether that interest would be substantially affected by the rule, (ii) if so, whether it would be represented by an individual already in the negotiating group, and (iii) whether, in any event, the petitioner should be added to the negotiating group, or whether interests can be consolidated and still provide adequate representation.

8. The agency should designate a senior official to represent it in the negotiations and should identify that official in the *Federal Register* notice.

9. It may be that, in particular proceedings, certain affected interests will require reimbursement for direct expenses to be able to participate at a level that will foster broadly-based, successful negotiations. Unlike intervenors, the negotiating group will be performing a function normally performed within the agency, and the agency should consider reimbursing the direct expenses of such participants. The agency should also provide financial or other support for the convenor and the negotiating group. Congress should clarify the authority of agencies to provide such financial resources.

* Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation, 1978 ACUS Recommendations and Reports 13, 1 C.F.R. 305.78-4.

10. The convenor and the agency might consider whether selection of a mediator is likely to facilitate the negotiation process. Where participants lack relevant negotiating experience, a mediator may be of significant help in making them comfortable with the process and in resolving impasses.

11. The goal of the negotiating group should be to arrive at a consensus on a proposed rule. Consensus in this context means that each interest represented in the negotiating group concurs in the result, unless all members of the group agree at the outset on another definition. Following consensus, the negotiating group should prepare a report to the agency containing its proposed rule and a concise general statement of its basis and purpose. The report should also describe the factual material on which the group relied in preparing its proposed regulation, for inclusion in the agency's record of the proceeding. The participants may, of course, be unable to reach a consensus on a proposed rule, and, in that event, they should identify in the report both the areas in which they are agreed and the areas in which consensus could not be achieved. This could serve to narrow the issues in dispute, identify information necessary to resolve issues, rank priorities, and identify potentially acceptable solutions.

12. The negotiating group should be authorized to close its meetings to the public only when necessary to protect confidential data or when, in the judgment of the participants, the likelihood of achieving consensus would be significantly enhanced.

13. The agency should publish the negotiated text of the proposed rule in its notice of proposed rulemaking. If the agency does not publish the negotiated text as a proposed rule, it should explain its reasons. The agency may wish to propose amendments or modifications to the negotiated proposed rule, but it should do so in such a manner that the public at large can identify the work of the agency and of the negotiating group.

14. The negotiating group should be afforded an opportunity to review any comments that are received in response to the notice of proposed rulemaking so that the participants can determine whether their recommendations should be modified. The final responsibility for issuing the rule would remain with the agency.

Recommendation 82-5: FEDERAL REGULATION OF CANCER-CAUSING CHEMICALS

(Adopted June 18, 1982)

The following recommendations broadly address the procedures by which federal agencies identify, evaluate, and regulate substances that pose a potential risk of human cancer. For many years these regulatory activities have been among the most controversial engaged in by federal

agencies. They implicate important health and economic values and attract the interest of groups throughout society. Some of the issues dealt with in these recommendations are not peculiar to the context of carcinogen regulation. The statutory procedures agencies follow in regulating human exposure to cancer hazards, for example, are applicable to many other environmental and health hazards. While these recommendations may thus have broader application or impact, they are based on an evaluation of agency performance in this context alone.

I. Priority Setting

Estimates of the number of chemicals that may pose a risk of human cancer describe a universe larger than government agencies can evaluate or regulate. Agency resources for scientific review and regulatory proceedings are shrinking, and the capacity of manufacturers and users of chemicals to implement costly controls is likewise limited. In these circumstances, attention should be concentrated on those chemicals that pose the greatest risks and can be controlled most economically. As agencies have increasingly recognized, accomplishing this objective requires establishment of priorities.

Priority setting should be part of any program directed at determining the health effects of chemicals, as well as of programs designed to establish exposure limits. Each regulatory agency should set its own priorities, but there is also value in interagency selection of candidates for regulation and, particularly, for further testing.

Although candidates for evaluation and regulation should be carefully selected, any ranking based on abstract criteria, however rational, will be vulnerable to new information about human exposure or health effects and to public concerns. Agencies should explain departures from established priorities, but should retain flexibility to respond to new problems.

Criteria for selecting candidates for regulation should include the extent of the hazard posed by a chemical—a function of its potency, the conditions of exposure, and the number of people exposed. The extent of the hazard can often be expressed in quantitative terms. Agencies should also consider the effectiveness and cost of alternative control measures as well as other effects of regulation. Estimates of the cost-effectiveness of regulating specific chemicals can be helpful in selecting priorities. Because of the complexity of these criteria and the continuing need to obtain additional information, selection of candidates for regulation will often be an iterative process.

Priority setting should be a public process which affords interested persons an opportunity to communicate their own views to the agency. Varied techniques exist short of rulemaking under the Administrative Procedure Act for providing such opportunities, including public meetings, use of expert advisory panels, and publication in the *Federal Reg-*

ister of invitations to submit data and views. Under whatever system, preliminary rankings risk being misinterpreted as definitive judgments about the hazards of chemicals before manufacturers and users have had an opportunity to present evidence or arguments. Accordingly, agency announcements of priorities should make clear the tentative character of underlying scientific assessments and describe the opportunities for interested persons to supply contrary or confirmatory information.

Recommendation

1. To the extent compatible with other demands on their resources, agencies should establish and follow systems for ranking chemicals as candidates for scientific evaluation or regulation. Agencies should generally adhere to the priorities thus established, but must retain the flexibility to respond to new hazards or to public concerns about other chemicals.

2. Priority setting should be part of selecting chemicals (a) for further testing, (b) for intensive scientific and regulatory evaluation, and (c) for administrative action to limit or eliminate exposure.

3. To the extent allowed by law, priorities should be set by agencies with the objective of maximizing the net benefits to society of agency action. Thus, in setting priorities, the agency should consider the expected benefits and costs of various alternatives. Although the criteria for selecting chemicals for further testing may be different, the criteria for selecting chemicals for regulation should take account of the health hazards posed by chemicals, including the potency of the chemicals, levels of exposure, the number of people likely to be exposed, and the costs and cost-effectiveness of methods for controlling exposure, to the extent that these may be known.

4. Because agencies differ in their functions, and their selection of candidates for evaluation and regulation must be coordinated with other agency programs, each agency should establish its own priorities. The several agencies responsible for regulating carcinogens should, however, periodically compare their rankings and, where feasible, coordinate their testing, evaluation, and regulatory efforts. Consultation with scientific, industrial, and public interest organizations should be encouraged.

5. Agency procedures for setting priorities should permit interested members of the public to submit information and views concerning specific candidates. Agencies should consider adopting priority setting systems through rulemaking, but more informal methods are appropriate for ranking individual chemicals for evaluation and regulation. Any agency announcement that a product or chemical is a candidate for further evaluation or for regulation should explain both the bases of that as-

assessment and its preliminary nature and should describe available procedures for confirming or negating its preliminary conclusions.

II. Interagency Coordination

Responsibility for regulating chemicals that pose a risk of human cancer is shared by several agencies, including most notably the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), Food and Drug Administration (FDA), and Consumer Product Safety Commission (CPSC). Only in recent years have these agencies attempted to coordinate their activities to assure consistency and enhance the benefits of regulation. While the agencies' criteria for identifying and evaluating potential carcinogens have in fact not been conflicting, their decisions have sometimes appeared difficult to reconcile, usually because of differences in legislation.

The creation of the Interagency Regulatory Liaison Group in 1977 rested on the premises that federal regulation of chemical carcinogens should proceed from common principles of scientific evaluation and should be coordinated administratively. While these premises remain valid, other mechanisms may be equally effective in assuring coordination. Opportunities for productive coordination exist in several areas: establishment of government-wide principles of scientific evaluation; agreement on test guidelines for toxicological experiments and other studies of health effects; ranking of chemicals for testing; and monitoring and enforcement of exposure controls.

The four agencies have on several recent occasions cooperated in the regulation of specific chemicals. They once assembled a central scientific working group to evaluate formaldehyde, a chemical of common interest, and they agreed on a common list of chemicals that were high priorities for coordinated regulation. Though diverse statutory procedures have sometimes discouraged joint administrative proceedings, opportunities at the preproposal stage for cooperation in evaluating health effects and performing economic analysis have not yet been fully exploited.

Recommendation

1. Interagency coordination in identifying, evaluating, and regulating potential human carcinogens should be encouraged. Effective coordination can reduce governmental costs, minimize inconsistency among the agencies, and better illuminate the economic costs of alternative control options.

2. Agencies should continue to cooperate in identifying chemicals for which further testing is needed to permit regulatory assessments. The National Toxicology Program should continue to elicit joint agency rankings of candidates for testing.

3. Regulatory agencies should collaborate with government scientific bodies, including the National Toxicology Program, National Institute

of Environmental Health Sciences, and National Center for Toxicological Research, to obtain agreement on guidelines for the conduct and evaluation of toxicological tests. This effort need not result in public rulemaking to adopt test protocols, but scientists outside government should have an opportunity to contribute to the development of test guidelines. Cooperative guidelines should also be considered for short term tests and epidemiological studies, but current guidelines should not discourage development of improved test methods.

4. To the extent permitted by statute, agencies responsible for regulating carcinogens should adhere to common criteria for evaluating and interpreting health effects data. Agencies should avoid inconsistency in their approaches to mixed science policy issues, such as whether to assume a no-threshold model of carcinogenesis, whether to perform quantitative estimates of human risk, or whether to allow evidence that a chemical produces an increase in cancer in laboratory animals through mechanisms that do not suggest human risk.

5. Agencies responsible for regulating carcinogens should continue to explore joint evaluation of the potential health hazards of chemicals that are candidates for regulation by more than one agency, for instance, by use of a multi-agency advisory panel for any particular substance.

6. Agencies should explore other opportunities to collaborate before the initiation of formal administrative proceedings to regulate a chemical. These may include joint development of exposure estimates and joint preparation of economic analyses of alternative regulatory approaches.

7. Agencies should, after eliciting the views of interested persons, consider conducting joint administrative proceedings when they contemplate regulating the same chemical. Statutory diversity may, however, complicate or even preclude such proceedings.

III. Chemical Selection and Guidelines for Testing and Evaluation

The selection of chemicals for study, the design of protocols for laboratory experiments, and the establishment of criteria for interpreting study results are important parts of the process for regulating substances that pose a risk of human cancer. These are essentially scientific functions which should not be dictated by narrow policy considerations. The important desiderata are scientific integrity and consistency.

At the same time, it remains true that much toxicological testing performed in the United States—by government laboratories and by or on behalf of private industry—is performed to aid regulatory decisionmaking. Numerous toxicological studies are performed to support marketing approval for food additives, pesticides, and pharmaceuticals. FDA and EPA have both conducted similar studies on substances within their regulatory jurisdiction. The agencies have also relied on studies

commissioned by the National Cancer Institute. The NCI bioassay program has more recently fallen under the supervision of the National Toxicology Program, whose supervisory board includes representatives of the regulatory agencies. NTP currently accepts nominations of chemicals for testing from the agencies.

Under the auspices of the former Interagency Regulatory Liaison Group, the four agencies studied here (EPA, OSHA, FDA, and CPSC) actively sought agreement on joint protocols for toxicological testing and on criteria for evaluation of study results.

Recommendation

1. In conjunction with the National Toxicology Program and in consultation with scientific organizations outside government, regulatory agencies should continue efforts to develop consistent guidelines for toxicological testing. These test guidelines should reflect current scientific consensus but also awareness of the resource limitations that constrain both government and industry. The guidelines developed or espoused by the agencies should not be issued as formal regulations. Rulemaking would needlessly prolong the process of reaching agreement, and formal regulations would limit the ability of agencies, producers, and testing laboratories to design protocols or adapt existing guidelines to new circumstances.

2. Agencies should adhere to similar test guidelines and similar criteria for interpreting test results. Any departure from common standards should be specifically and convincingly justified.

3. The National Toxicology Program should continue to encourage the participation of EPA, OSHA, FDA, and CPSC in its selection of chemicals for testing. It should be willing, on request, to assist agencies in their evaluation of study findings. The NTP special working group to evaluate the carcinogenicity of formaldehyde for all of the four regulatory agencies represents one promising experiment in the effort to assure consistency among the agencies.

IV. Advisory Panels

Assessment of the health risks posed by chemicals requires substantial information about their toxicity and about the conditions under which humans are exposed to them, as well as understanding of the techniques for obtaining such information. Techniques for toxicological evaluation, exposure estimation, and quantitative assessment of human risk increasingly demand state-of-the-art expertise. Evaluation of potential human carcinogens also requires impartiality in assessing the quality and interpreting the results of toxicological and epidemiological studies. In the scientific world, new research findings are customarily exposed to peer review before they become accepted as reliable. Increasingly, regulatory agencies have concluded that the data on which they rely,

and the interpretations they give these data, should be subjected to peer review before becoming the bases for regulatory decisions.

Several proposals have recently been advanced to mandate and institutionalize this peer review function. Some of these proposals call for strict separation of risk assessment from the process of evaluating and selecting regulatory options. These proposals raise difficult issues respecting the design of procedures for administrative decisionmaking about chemical carcinogens. The function of assessing risk can be distinguished analytically from the choice of regulatory responses, but separating them in practice is more difficult. The close relationships among issues of toxicity, exposure, and the cost of controls make the process of agency evaluation an interactive one. Accordingly, mechanisms for exposing agency judgments to peer review should be flexible enough to permit frequent interchange with agency policy makers.

One method that agencies have successfully used for institutionalizing peer review is consultation with expert advisory panels. These panels have taken several forms, ranging from informal working groups of agency scientists assigned to review a single chemical to standing committees of independent experts who advise on numerous candidates for regulation. Advisory panels can contribute objectivity as well as expertise to agency decisions. Their advice has sometimes prevented erroneous regulatory actions; more frequently, their role has been to illuminate complex issues and enhance the quality, and thus the credibility, of agency scientific analysis.

Advisory panels comprised in whole or in part of non-federal employees are governed by the Federal Advisory Committee Act (FACA), unless exempted by specific legislation. The FACA requires individual chartering and biennial reapproval and mandates practices that are designed to assure the balance, openness, and integrity of advisory committees. Most of these requirements are salutary, and the following recommendations endorse their observance by panels even where not formally subject to the FACA. Certain of the Act's provisions, however, have discouraged agencies from seeking outside peer review. The recommendations advanced here are intended to encourage agency resort to expert advisory panels without necessarily endorsing every requirement of the FACA. None of these recommendations should be construed as superseding either that Act, where applicable, or federal conflict of interest laws.

Recommendation

1. Peer review of experimental findings and scientific judgments is an important means of validating the technical bases of regulatory decisions concerning carcinogens. To the extent compatible with existing law, agencies should structure their decisional processes to incorporate mechanisms for scientific peer review.

2. Expert advisory panels represent one valuable means for obtaining scientific peer review of agency decisions. Advisory panels can provide information that will aid agencies in setting priorities, in evaluating scientific data prior to initiation of administrative proceedings, and in evaluating evidence submitted by interested persons during public proceedings.

3. The design, composition, and operation of an advisory panel should fit the function it is to perform; no uniform approach is optimal. A standing advisory panel, with responsibility for reviewing the scientific bases of major actions by a particular program, can contribute consistency in addition to expertise, and it provides a ready forum for agency consultation. To assure that the panel has access to relevant expertise, subunits can be appointed to evaluate specific chemicals or issues. An agency that lacks a standing advisory panel, however, should not forgo opportunities to create ad hoc panels to review the scientific bases of contemplated regulatory actions.

4. The role of an expert advisory panel may embrace evaluating data concerning the health effects of chemicals, interpreting those data and characterizing the chemicals' effects, and estimating the likely frequency of those effects under different exposure conditions. When an agency rejects an advisory panel's scientific judgment, it should explain the bases for that rejection. When an agency selects a regulatory approach whose bases appear inconsistent with a panel's advice, it should explain the legal, social, or other reasons that dictate or justify that choice.

5. Members of an expert advisory panel should be selected primarily for their expertise in relevant scientific fields. Qualified scientists, even if employed by the agency they are to advise, by other government agencies, or by commercial organizations, may appropriately be selected to serve on advisory panels. In the selection of panel members, attention should be given to assuring balance in scientific orientation and viewpoint. The organizational affiliations of all panel members should be a matter of public record. The financial holdings and relationships of potential panel members should be carefully screened by the appointing officials and periodically reviewed thereafter to prevent conflicts of interest. If a panel includes members who are not disinterested with respect to a particular substance, those members should not participate in the panel's discussions of that substance.

6. Advisory panels should be accessible for consultation by the appointing agency at frequent intervals and on short notice. Consultation should usually occur before any announcement of a plan to regulate a chemical. Even when the Federal Advisory Committee Act does not apply, many of its requirements represent appropriate guides for the operation of advisory panels. Referrals of issues to advisory panels and meetings of agency officials with panel members should be matters of public record. Advance public notice of panel meetings should be provided where practicable. Panels should meet in open session except when

reviewing data that are entitled to confidential treatment or, unless restricted by statute, when the panel members vote to close their deliberations. All panel conclusions and recommendations should be reduced to writing and become a part of the material to be considered in any ensuing administrative proceeding.

7. Advisory panels established to evaluate scientific data for, and provide advice to, more than one agency may often be useful. Such panels can be particularly valuable in recommending chemicals for further study or testing. Where a chemical is of interest to more than one regulatory agency, a single advisory panel may be an efficient way of obtaining an independent assessment of its potential health effects. Interagency panels should be subject to the same restrictions as to composition, operation, and scope of responsibility as panels appointed to serve a single agency.

V. Generic Rulemaking

Agencies responsible for regulating potential carcinogens have attempted to develop and publish criteria for evaluating scientific data that underlie their decisions. These efforts have included informal statements of policy, proposed interpretative regulations, binding substantive standards, and interagency policy statements. The motives underlying these efforts to establish a framework for evaluating evidence concerning individual chemicals have been as diverse as the forms they have taken. One objective has been to obtain agreement among the agencies on the scientific criteria and policies that inform regulation of carcinogens. Another objective has been to improve understanding, among the public and within agency staffs, of the principles that guide agency decisions. Some agencies have also attempted to frame these principles as rules of decision in order to forestall repetitive disputes in proceedings to regulate individual chemicals.

The desirability of assuring agency adherence to common principles of scientific interpretation seems clear. Equally important is conformity of these principles with the best current understanding of the mechanisms of carcinogenesis, of toxicological and epidemiological research, and of quantitative risk assessment. Attempts to treat decisional guides as though they were binding substantive rules may conflict with the need to remain sensitive to developments in rapidly changing fields.

The efforts of individual agencies to establish criteria for identifying and evaluating potential human carcinogens have been criticized on several counts. In addition to disputing the content of agency judgments, industry critics have questioned the appropriateness of analytic frameworks that discourage individualized assessment of the capacity of chemicals to cause cancer. The duration of agency rulemaking proceedings suggests difficulty in obtaining scientific agreement in this area, but the controversy more often betrays disagreement over agency policy judgments rather than over their distillation of scientific consensus.

Recommendation

1. In appropriate cases generic rules legitimately may be the basis for summary administrative resolution of recurrent issues, provided they do not foreclose reexamination of scientific conclusions respecting carcinogenicity of particular substances. Agencies should proceed cautiously in using this technique because the complexity and uncertainty of the issues involved and continuing advances in scientific understanding of the mechanisms of human cancer impede development of binding general principles.

2. Agencies should be encouraged to develop systematic statements of the principles that they will apply in identifying, ranking, and evaluating chemicals that may pose a risk of human cancer. The systematizing process should ordinarily involve opportunity for submission of data and views by interested persons outside the agency. Whenever an agency expects to limit argument over principles that will guide decisions in proceedings to regulate individual chemicals, compliance with statutory requirements for rulemaking is essential before the principles are formulated.

3. Agency statements may appropriately address the design and interpretation of scientific studies, the measurement or estimation of human exposure, the performance of quantitative risk assessment, and the selection of regulatory responses. These statements should attempt to distinguish between elements that are intended to summarize current scientific consensus and others that represent policy judgments reached in the absence of consensus. Policy judgments are an inevitable component of regulatory decisions and, where similar issues arise recurrently, are appropriately resolved on a generic basis. But where scientific developments in the near term are likely to require modification, or where individual studies or chemicals are often likely to deviate from the "norm," they should not be framed as binding rules.

4. Many issues involved in identifying, evaluating, and regulating potential carcinogens are common to all agencies and should be resolved consistently. These issues range from the criteria for interpreting scientific studies to the selection of mathematical models for estimating human risk. Though scientific uncertainty surrounding many of these issues requires considerations of value and policy, disparate agency responses should be avoided or convincingly justified.

VI. Quantitative Assessment of Risk

Various pressures and incentives have encouraged regulatory agencies to explore methods for quantifying the risk of potential carcinogens. At the same time the use of quantitative risk assessment in making regulatory decisions has provoked fierce controversy. Industrial interests have generally urged agencies to regard quantification as an essential step in evaluating measures for controlling carcinogens. Consumer

groups and labor unions, on the other hand, have cautioned against excessive reliance on techniques whose reliability remains uncertain. The agencies themselves have for some time had difficulty reaching consensus on the issue.

Criticism of quantitative risk assessment stems in part from doubts about its reliability. Reliance on animal models as qualitative predictors of human risk often may be unavoidable, and the further extrapolation from effects observed at high doses to the unmeasurable effects predicted at low doses compounds uncertainty. Critics also point to the wide range of risks at low doses predicted by different extrapolation models. A further criticism is that quantitative risk assessment can too easily be exploited to compute the dollar value implicitly assigned by regulators to human life.

Despite these criticisms, quantitative risk estimation has an appeal for both analysts and decisionmakers. Without some means of describing the magnitude of the health effects associated with exposure to a carcinogen an agency must find some other basis for deciding what controls to require. Legislation sometimes provides an answer. The Delaney Clause, for example, makes quantification of the risk of a carcinogenic food additive superfluous. Under any statute that permits or instructs the agency to weigh the costs against the health consequences of alternative means of controlling exposure, however, a method to quantify risks has proved essential.

Quantitative risk assessment can help illuminate many of the choices that agencies confront in regulating carcinogens. Even with its uncertainties, the technique facilitates comparison of the risks posed by different substances, which can aid in establishing priorities for regulation. Similarly, quantitative risk assessment can illuminate the choice among diverse regulatory options. A common unit of measurement for evaluating the health benefits of different options can materially advance analysis of a multidimensional decision even if the measurements are unverifiable and the benefits are not converted into dollars.

Recommendation

1. Quantitative risk estimates can be valuable in setting priorities for regulation of carcinogens, comparing the human health consequences of alternative control measures, and in analyzing the costs and benefits of regulatory options. To the extent regulatory statutes allow and available data permit, agencies should attempt to estimate and describe the magnitude of the risk posed by prevailing levels of exposure to substances considered for regulation. Within the same constraints, agencies should also attempt to describe the size of the health benefits provided by measures required to reduce or eliminate human exposure.

2. Given the limitations of techniques for quantitative risk assessment and different statutory criteria for limiting or eliminating exposure, risk

estimates ordinarily will be only one consideration. The weight accorded such estimates should reflect:

- a) the statutory criteria governing agency decisions;
- b) the adequacy of available data on carcinogenic potency and on the type, levels, and duration of human exposure; and
- c) the acceptance of the methods used to estimate future health effects.

3. Any description of the magnitude of the risk associated with prevailing exposures or of the estimated health benefits of exposure controls should explicitly identify:

- a) the toxicological, epidemiological, and exposure data on which it rests;
- b) the assumptions underlying any extrapolations from animals to man or from high to low exposure levels;
- c) other assumptions about the behavior of the substance or about the characteristics of human exposure to it; and
- d) the range of uncertainty associated with the estimates.

4. Quantitative estimates of risk associated with exposure to a substance—particularly when expressed in terms of lives likely to be lost or cases of cancer likely to occur—have a power to captivate public and press attention. Such estimates should be accompanied by statements stressing their imprecision and uncertainty. When the available health effects data are seriously deficient or little is known about human exposures to a substance, the risk of misinterpretation may justify an agency decision not to attempt quantitative estimates of risk or health benefits.

VII. Public Participation

Several values are served by public participation in the regulatory process. Perhaps preeminent is the value of fairness to those who may be directly affected by government action. The "right to be heard" before government acts adversely to important private interests is well established in American administrative law. This is reflected in the Administrative Procedure Act and by most regulatory statutes.

A second purpose served by broad public participation in agency decisionmaking is avoidance of mistaken even though well intentioned judgments that rest on incomplete information. In the context of carcinogen regulation this value enjoys a high rank. Decisions concerning human exposure to potential carcinogens should rest on sound scientific and economic judgments. Estimates of risk and cost require information that agencies often lack, as well as analytical skills that are found in industry and many public interest organizations. Accordingly, agency procedures should facilitate participation by those in the private sector with relevant scientific and economic expertise.

A third important value served by public participation is balance. Agency decisions concerning environmental health hazards require gov-

ernment to take large chances with both human life and private business. Data are invariably inadequate and estimates of future consequences are problematical; these uncertainties simply complicate an already difficult task. Determining the appropriate level of human exposure to a substance reasonably found to cause cancer is fundamentally a normative exercise in which there are no experts. Because decisions are left to regulators with sometimes scant congressional guidance, agency procedures should facilitate broad participation and vigorous debate to assure agency understanding of diverse viewpoints.

Finally, the opportunity to influence agency thinking, coupled with an awareness that agency procedures permit broad participation, contributes to the acceptability of agency decisions.

Public health or scientific interests may not have participated in the regulatory process on equal footing with commercial interests. The extent to which this disparity, if it exists, is a function of lack of resources and whether it should be addressed through public funding of citizen participation are questions that transcend carcinogen regulation. The arguments for and against funding should be considered in the broader context.

Recommendation

1. In setting exposure limits for carcinogens, agencies ordinarily should follow procedures that assure opportunities for all affected interests, commercial and non-commercial alike, to submit information and views before final decisions are reached. Procedures may appropriately vary with the requirements of agency organic statutes, with the characteristics of the activity or products whose regulation is contemplated, and with the need for prompt action to limit exposure.

2. Agencies should encourage and facilitate the participation of independent experts in toxicology, epidemiology, risk and exposure estimation, and other relevant technical disciplines. A useful way of eliciting participation in the regulatory process by independent scientists is through the use of standing or ad hoc advisory panels.

3. Congress should refrain from imposing procedural requirements, such as section 701(e) of the Federal Food, Drug, and Cosmetic Act, which are so burdensome that agencies search for regulatory approaches that have the effect of precluding effective participation in their decisionmaking processes by affected interests.*

* See also Administrative Conference Recommendation 71-7: Rulemaking on a Record by the Food and Drug Administration, 2 ACUS Recommendations and Reports 42 (1973); and Recommendation 72-5: Procedures for the Adoption of Rules of General Applicability, 2 ACUS Recommendations and Reports 66 (1973), 1 C.F.R. 305.72-5.

Recommendation 82-6: FEDERAL OFFICIALS' LIABILITY FOR CONSTITUTIONAL VIOLATIONS

(Adopted December 16, 1982)

This recommendation focuses on the increasing risk to federal executive branch officials of civil liability for monetary damages for alleged violations of federal constitutional rights. This vulnerability has expanded dramatically in recent years, as a result of judicially-discovered rights enunciated in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and subsequent court cases involving allegations of official misconduct. Under the present system of officials' liability, as developed piecemeal by the courts, an individual federal employee (except certain categories of officials, including the President, who have been ruled to have absolute immunity) may be held personally liable for acts that, though committed while the employee was acting within the scope of office or employment, may subsequently be found to violate a constitutional provision. Juries may hold officials liable for actual damages where they cannot show that their actions were taken in good faith—that is, in the belief that their conduct was lawful—and for punitive damages where they are shown to have acted maliciously or with reckless disregard of the plaintiff's constitutional rights. At present, damages may not be recovered against the United States for violations of constitutional rights as such, although claims arising out of the same conduct may or may not be stated against the government under the Federal Tort Claims Act, 28 U.S.C. 2671-2680.

The existing system of civil sanctions for constitutional violations by federal officials does not provide adequate assurance of compensation for victims of such violations and discourages proper conduct by government officials. In addition, the federal government often has interests at stake in constitutional tort litigation involving its officials which may not be represented adequately when individual officials themselves are the defendants on trial.

In *Carlson v. Green*, 446 U.S. 14 (1980), the Supreme Court suggested that the courts may properly refuse to entertain monetary damage actions against federal officials if Congress has expressly substituted a different remedy or made available an alternative to the *Bivens* remedy. In the Conference's view, such an alternative system is likely to improve the effectiveness with which federal programs and laws are administered.

To serve the primary goals of compensation, deterrence, and fairness in dealing with constitutional violations assertedly committed by federal officials, and to afford a solution to the problems perceived to flow from the current system of individual liability, Congress should replace the existing system by accepting public liability for wrongs done in the public's name and by strengthening the means of dealing with the wrongdoers. When defending against constitutional tort claims, the govern-

ment should be able to assert any immunity or good faith defense available to the officials.

Since the Conference's mandate extends only to matters affecting the administration of federal agencies' programs, this recommendation addresses only actions against executive agency officials. We do not intend to suggest that the same considerations do not apply to officials of the legislative and judicial branches.

Recommendation

1. Congress should enact legislation providing that the United States shall be substituted as the exclusive party defendant in all actions for damages for violations of rights secured by the Constitution of the United States committed by federal executive branch officers and employees while acting within the scope of their office or employment. The legislation should provide adequate procedures to ensure that, where a damage action for violation of such rights is brought against an executive branch officer or employee, such action should be deemed to have been brought against the United States upon certification by the Attorney General that the defendant officer or employee was acting within the scope of his office or employment at the time of the incident out of which the suit arose. The Attorney General's failure to make such certification should be judicially reviewable.

2. Such legislation should provide that, in actions alleging constitutional violations, the United States may assert as a defense any qualified immunity or good faith defense available to the executive branch officer or employee whose conduct gave rise to the claim, or his reasonable good faith belief in the lawfulness of his conduct. The United States should also be free to assert such other defenses as may be available, including the absolute immunity of those officers entitled to such immunity.

3. The agency that employed the offending official should be responsible for investigation and, where appropriate, for disciplining the official and implementing any other appropriate corrective measures. The Office of Personnel Management should assure, via guidance promulgated through the Federal Personnel Manual and other devices, that agencies are authorized to employ existing mechanisms to impose sanctions on officers and employees who have violated the constitutional rights of any person. Employees should be permitted to assert as a defense in any disciplinary proceeding their good faith in taking the action in question, as well as such other defenses as may be available.

4. Congressional legislation should preserve the opportunity for jury trial only with respect to claims that arose prior to the effective date of the legislation implementing this recommendation.

Recommendation 82-7: JUDICIAL REVIEW OF RULES IN ENFORCEMENT PROCEEDINGS

(Adopted December 17, 1982)

A person adversely affected by an agency rule may ordinarily obtain judicial review of that rule either by instituting a direct review proceeding against the agency in an appropriate court (preenforcement review)¹ or by asserting the invalidity of the rule as a defense in a civil or criminal proceeding to apply or enforce the rule (enforcement review). Prior to the Supreme Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), direct review was generally difficult to obtain because of technical defenses such as lack of ripeness or lack of standing, and most review of rules took place in the context of enforcement proceedings.

Under *Abbott Laboratories* and subsequent decisions, direct review of agency rules has become increasingly available. Congress in much recent regulatory legislation has specifically provided for immediate resort to judicial review at the conclusion of the rulemaking proceeding. As a result, direct judicial review of rules has come to be regarded as the norm and review in an enforcement proceeding is less common. In a number of statutes, in fact, Congress has sought to encourage prompt direct review by explicitly precluding or limiting the availability of review at the enforcement stage.

At the same time, and perhaps largely as a result of the increasing importance of direct judicial review of rules, courts have intensified their scrutiny of the administrative process preceding promulgation of the rule. Whereas in the pre-*Abbott Laboratories* era challenges to rules were most frequently based on assertions of lack of agency authority or on inapplicability of the rule to the party's particular circumstances, today the issues in direct review proceedings increasingly include whether the agency made the proper procedural choices in the rulemaking proceeding and whether the rule finds adequate support in the administrative record.

The Administrative Procedure Act does not by its terms establish different standards of review for direct review proceedings and enforcement proceedings, and few courts have considered the implications for review in enforcement proceedings of the increasingly intensive standard developed in direct review proceedings. Moreover, in adopting statutory provisions precluding enforcement review Congress has not

¹ We use the term "direct review" to refer to judicial review of a rule of general applicability before the rule is applied to a particular person in an adjudicative proceeding. Such review may be by the court of appeals pursuant to a special statutory review procedure or by the district court in the exercise of its power under the Administrative Procedure Act to review agency action not otherwise reviewable. See ACUS Recommendations 74-4: Preenforcement Judicial Review of Rules of General Applicability and 75-3: The Choice of Forum for Judicial Review of Administrative Action.

distinguished between these process-related objections and other types of objections to rules.

In Recommendation 76-4, the Conference criticized provisions precluding enforcement review in the Clean Air Act and the Federal Water Pollution Control Act. In view of the increasing reliance on direct review and the proliferation of issues concerning the adequacy of the rulemaking process rather than the agency's authority to promulgate a particular rule, however, the Conference now believes that limitations on judicial review of rules in enforcement proceedings may sometimes be appropriate. The purpose of this recommendation is twofold: to identify factors that Congress should consider in deciding whether to preclude enforcement judicial review, and to distinguish between types of challenges to rules that should ordinarily be covered by any preclusion provisions Congress decides to adopt and types of issues that should ordinarily remain available in enforcement proceedings even where preclusion provisions have been adopted.

Sound principles of administrative law favor prompt and dispositive resolution of disputed issues arising from an administrative rulemaking proceeding. Direct review in the court of appeals is more likely to afford such a resolution than later enforcement review in one or more district courts.² The uncertainty caused by the potential for conflicting court decisions and by the possibility that a rule may be overturned several years after its promulgation can be extremely disruptive of the regulatory scheme. In addition, reopening a rulemaking proceeding to correct any defects will become increasingly difficult as the original record grows stale over time and the situation of the interested parties changes.

On the other hand, those affected by a rule should have a full and fair opportunity to challenge the rule on all available grounds. These interests must be balanced in determining when limitations on enforcement review of rules are appropriate. The balance will tip in favor of limitations on enforcement review when the impact of foreclosing review on those affected by a rule is the least and when the costs of regulatory uncertainty or of declaring a rule invalid after several years are the greatest. Thus one factor favoring limitations on enforcement review is the likelihood that the groups affected by rules promulgated under a particular statute will be well represented in the agency rulemaking proceeding because, for example, those groups are well defined and/or well organized. Widespread participation in the rulemaking proceeding reduces the probability that any significant issue concerning the rule, particularly one pertaining to the rulemaking process itself, will be overlooked on direct review.

² The recommendation is based on the assumption that, where Congress has provided by statute for direct review of rules, review will ordinarily lie in the court of appeals rather than in the district court. See ACUS Recommendation 75-3.

The likelihood that a rulemaking proceeding will involve complex procedures or intensive factual exploration also militates in favor of limits on enforcement review. The more elaborate and formal the administrative rulemaking procedures (such as those required by hybrid rulemaking statutes³, the more likely it is that the rule will be subject to challenge on the basis of a relatively narrow issue involving the procedures used or the record support for some aspect of the rule. As time passes, reopening such a complex proceeding after a court reversal will be increasingly burdensome. Encouraging the dispositive resolution of challenges to a rule on direct review (perhaps while effectiveness of the rule has been stayed) is also advisable when the costs of regulatory uncertainty are particularly high. Sometimes compliance with a rule entails substantial expense that will not be fully recoverable if the rule is later overturned. Similarly, when Congress determines that there is a need to achieve important regulatory goals promptly nationwide, or when it is particularly important that rules apply industry-wide in order to avoid unfair competitive advantage to noncomplying businesses, repeated litigation over the validity of the rules in various district courts should be avoided if possible.

Even when Congress decides that limits on enforcement review are warranted, it should not foreclose all challenges to rules at the enforcement stage. Some grounds for review can be precluded with little unfairness to parties who may be unaware of the original rulemaking proceeding or are otherwise unable to seek direct review, while others raise fundamental questions about the substance of the rule or its application in circumstances that may have been unforeseen at the time of promulgation. Challenges based on asserted errors in the administrative process are those most suitable for preclusion. When objections on procedural grounds are raised early, errors may be remedied promptly and the rulemaking process recommenced with a minimum of disruption to the interests of those affected by the rule. And objections based on asserted inadequacy of the administrative record may lose their relevance as that record itself becomes dated. These objections, moreover, do not ordinarily turn on the situation of a particular individual or entity or on a particular interpretation of the rule, and can be raised as well by one party as by another.

On the other hand, considerations of fairness and judicial economy may argue for retaining a right to raise in enforcement proceedings those objections based on asserted lack of statutory authority or the inapplicability or unreasonableness of the rule as applied to the facts of the case. Moreover, there may be constitutional inhibitions against pre-

³ See, e.g., ACUS Recommendations 79-1: Hybrid Rulemaking Procedures of the Federal Trade Commission and 80-1: Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.

cluding or restricting at any time challenges based on the asserted unconstitutionality of a rule either on its face or as applied.

The Conference recognizes that the line between issues of process and those of statutory authority may not always be a bright one. For example, the question of whether there is statutory authority to apply a rule to a particular situation may tend to converge with the issue of the adequacy of record support for the rule. However, if the distinctions suggested below are made, statutory provisions will afford the courts adequate guidance in most situations. When ambiguity nonetheless results, the well established presumption of reviewability will continue to apply.

Recommendation

1. In drafting a statute that provides for adequate preenforcement judicial review of rules, Congress should consider whether to limit the availability of review at the enforcement stage. In deciding whether to limit the availability of enforcement review in a particular statute, Congress should consider the following factors as favoring such a limitation:

- a) the likelihood that the rulemaking proceeding will attract widespread participation;
- b) the likelihood that the proceeding will involve complex procedures or intensive exploration of factual issues;
- c) the likelihood that those affected by the rule will incur substantial and immediate costs in order to comply with it; and
- d) the need for prompt compliance with the rule on a national or industry-wide basis.

2. When Congress decides to limit the availability of judicial review of rules at the enforcement stage, it should ordinarily preclude review only of issues relating to procedures employed in the rulemaking or the adequacy of factual support for the rule in the administrative record. Judicial review of issues relating to the constitutional basis for the rule or the application of the rule to a particular respondent or defendant should be permitted when these issues are raised in subsequent suits or as defenses to subsequent enforcement actions (subject to the principles of collateral estoppel and stare decisis). Judicial review of issues relating to the statutory authority for the rule should be precluded at the enforcement stage only where Congress has concluded that there is a compelling need to achieve prompt compliance with the rule on a national or industry-wide basis.

3. When Congress limits the availability of judicial review of rules at the enforcement stage as described in paragraph 2, it should provide that, in an exceptional case when foreclosure of issues will work a severe hardship or otherwise produce a manifestly unjust outcome, a court may either dismiss or stay the proceedings and refer the rule to the affected agency for its reconsideration.

4. Paragraph D of Recommendation 76-4: Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act, 1 CFR 305.76-4, is hereby superseded to the extent that it is inconsistent with this recommendation.

**VIEWS OF THE ADMINISTRATIVE CONFERENCE ON
PROPOSALS PENDING IN CONGRESS TO
AMEND THE INFORMAL RULEMAKING PROVISIONS
OF THE ADMINISTRATIVE PROCEDURE ACT**

(Adopted June 18, 1982)

The Administrative Conference has reviewed the major regulatory reform proposals pending in Congress: H.R. 746, the Regulatory Procedure Act of 1982, reported by the House Judiciary Committee on February 25, 1982, and S. 1080, the Regulatory Reform Act, passed by the Senate on March 24, 1982. These bills would substantially revise the provisions of the APA governing informal rulemaking, 5 U.S.C. 553. Our views on the following proposed revisions of section 553 are set forth below.

1. *Notice of proposed rulemaking.* The Conference believes the detailed notice requirements of amended section 553(b)(1)(F), in section 3 of the Senate bill, are unduly burdensome as general requirements in rulemaking.

The Conference recommends enactment of the provision in section 3 of the Senate bill that would amend section 553 to require publication of a new notice of proposed rulemaking and an opportunity for comment thereon, whenever the provisions of the rule the agency plans to adopt are so different from the provisions of the original proposal that the initial notice no longer fairly apprises the public of the issues ultimately to be resolved in the rulemaking.

2. *Opportunity to present comments.* The Conference has no objection to enactment of the provisions in the House and Senate bills that would establish a minimum comment period in rulemaking under section 553, provided that the "good cause" exception in section 553(b) is retained.

The Conference recommends that an opportunity for oral presentation of data and views should not be a mandatory requirement in rulemaking under section 553 even if the requirement is limited, as in the Senate and House bills, to "major" rulemakings. The Conference has recommended, in Recommendation 76-3, that in appropriate circumstances agencies should utilize oral presentations in informal rulemaking, but agencies should have discretion to decide when and to whom the presentations are made.

3. *Cross-examination.* The Conference recommends that Congress not enact the provisions in the Senate and House bills that would require cross-examination to be permitted in rulemaking under section 553, even though the bills would only require use of cross-examination as a "last

resort" procedure. The Conference has previously recommended, in Recommendation 76-3, that agencies should give interested persons an opportunity to indicate issues of specific fact for which they contend cross-examination is appropriate, and that if cross-examination is permitted, it should be strictly limited as to subject and duration.

4. *The requirement of a rulemaking file.* The Conference recommends that Congress amend the APA to provide that, in rulemaking under section 553, an agency shall maintain a public rulemaking file beginning no later than the date on which the notice of proposed rulemaking is published. At a minimum, the agency should be required to place in the public rulemaking file, promptly upon receipt or production, the following materials: (1) all notices pertaining to the rulemaking, (2) copies, or where impractical a reference to or index of, all factual material upon which the agency substantially relied in formulating the proposed or final rule, unless the material is by law exempt from disclosure, (3) all written comments submitted by interested persons during the rulemaking, and (4) any other material required by statute or agency rule to be made public in connection with the rulemaking.

5. *Opportunity to comment on material in the rulemaking file.* The Senate bill provides that an agency may not substantially rely upon factual material that was not placed in the rulemaking file in time to afford the public an adequate opportunity to comment on the material. The Conference opposes enactment of a statutory provision to this effect because the practical effect of such an inflexible requirement would be to encourage nonsubstantive challenges to final agency rules. The Conference, however, does reaffirm the principle, stated in Recommendation 76-3, that agencies provide an appropriately limited additional opportunity to comment when material placed in the rulemaking file, including comments filed in the proceeding, presents new and important issues or serious conflicts of data.

6. *Statement of basis and purpose.* The Conference recommends enactment of the provisions in the House and Senate bills that would amend section 553 to add a requirement that the statement of basis and purpose accompanying a final agency rule include a response to all significant issues raised in the public comments received by the agency during the comment period established for the rulemaking.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON DISCIPLINE OF ATTORNEYS PRACTICING BEFORE FEDERAL AGENCIES

(Adopted December 16, 1982)

Because of the controversy regarding actions by the Securities and Exchange Commission, through administrative rather than court proceedings, to discipline attorneys whose services were used in transactions that the Commission believes violate the securities laws, the

Administrative Conference undertook a study of procedures and concerns of federal departments and agencies in disciplining attorneys practicing before them. The Conference concludes that any current problems arising from the discipline of attorneys by federal agencies are not of such magnitude or so widespread as to require legislative action or the adoption of uniform federal standards.



Public Member Owen Olpin (seated, far right), Chairman of the Committee on Inter-agency Coordination, leads the discussion on Recommendation 82-4 at the 24th Plenary Session. Others on the dais (left to right): David Pritzker (Staff Attorney), Philip J. Harter (Consultant), Stephen L. Babcock (Executive Director), and (standing) Chairman Loren A. Smith.

ACTIVITIES OF COMMITTEES

Conference members participate actively in the research activities of the Conference through the standing committees prescribed by the by-laws and through such additional special purpose committees as the Chairman, Council, or members find necessary to further the Conference's mandate. There were nine standing committees from January to November in 1982. In December the committee structure was revised (1 C.F.R. 302.3) to form six new standing committees, and all pending projects were transferred to the new committees.

Each standing committee works generally within the field of inquiry suggested by its title. Distinctions between committee responsibilities are intentionally fluid in order to permit the members wide latitude for inquiry. Since projects are often pertinent to the concerns of more than one committee, the Office of the Chairman coordinates the committees' activities to prevent conflict or duplication of effort.

STANDING COMMITTEES (December 1982)

Committee on Adjudication

In addition to matters relating to formal adjudication under the Administrative Procedure Act, this committee has a broad mandate to study and recommend fair and efficient procedures for agency activities that may affect private rights but do not involve formal, structured proceedings. These "informal" matters, which make up the great majority of all agency business, include exercise of prosecutorial discretion, negotiation and mitigation of civil penalties, handling of applications and complaints, and providing guidance for private parties on legal and policy matters. The committee also examines the distribution of responsibility within agencies, including internal delegations of authority and procedures for review of staff action; practices affecting the competence, effectiveness, and ethical standards of agency employees involved in administrative proceedings, and their potential civil liability; and problems concerning personnel selection, evaluation, compensation, and tenure.

Chairman: JANE A. MATHESON

Vice Chairman: MICHAEL J. HOROWITZ

Pending Projects:

- i. Agency internal procedures for review of administrative law judge decisions (consultant: Ronald Cass)



Members at the 25th Plenary Session. Clockwise from upper left: Professor Kenneth Culp Davis (Senior Fellow); Chief Judge Howard T. Markey (Liaison Representative—U.S. Court of Appeals for the Federal Circuit); Judge J.F. Green (Liaison Representative—American Bar Association National Conference of Administrative Law Judges); and Margery H. Waxman (Member—Department of the Treasury), Chairman of the Committee on Governmental Processes, leading the discussion of the “Statement of the Administrative Conference on Discipline of Attorneys Practicing before Federal Agencies”.

- ii. Performance evaluation of administrative law judges (consultant: Victor G. Rosenblum)
- iii. Assessment of the Government in the Sunshine Act (consultant: David M. Welborn)

Committee on Administration

This committee deals with the procedures by which agencies operate programs of financial assistance, procurement, and property administration, including techniques for resolving disputes, methods of allocating benefits among applicants, and the effects of program administration on state and local entities.



Members in debate at 1982 plenary sessions. Clockwise from upper left: S. Neil Hosenball (Member—National Aeronautics and Space Administration), Chairman of the Committee on Administration; Juan A. del Real (Member—Department of Health and Human Services); H. Clayton Cook, Jr. (Public Member), Chairman of the Committee on Judicial Review; and (lower left, left to right) Marilyn G. Wagner (alternate for Sherman E. Unger, Member—Department of Commerce), Judge Stephen Breyer (Liaison Representative—Judicial Conference of the United States), and Jerome D. Sebastian (Member—Internal Revenue Service).

Chairman: S. NEIL HOSENBALL

Vice Chairman: JOSEPH A. MORRIS

Pending Projects:

- i. Effective implementation of block grants (consultant: George D. Brown)
- ii. Consistent administration of grant programs through organizational approaches (consultant: Sallyanne Payton)

Committee on Governmental Processes

This committee examines the wide range of techniques used by agencies in carrying out federal programs. The committee is concerned with problems in the structuring and management of institutional decision-

making, including methods for developing, refining, and evaluating relevant information, and eliminating sources of delay in administrative proceedings.

Chairman: MARGERY H. WAXMAN

Vice Chairman: JOHN J. KNAPP

Pending Projects:

- i. Inspections for regulatory violations (consultant: Jack M. Kress)
- ii. Use of the Freedom of Information Act as a discovery device in litigation (consultant: Edward A. Tomlinson)

Committee on Judicial Review

The responsibility of this committee is to examine provisions concerning judicial review of administrative action, and those aspects of administrative procedure that have particular effects on the availability or effectiveness of judicial review.

Chairman: H. CLAYTON COOK, JR.

Vice Chairman: DAVID A. CLANTON

Pending Projects:

- i. Control of discretion through articulation of policy standards (consultant: Colin Diver)

Committee on Regulation

This committee is concerned with procedural problems associated with the administrative control of private economic activity. It examines techniques for assessing regulatory costs and benefits, procedural aspects of deregulation, and methods for resolving conflicts between economic, safety, environmental, and other values. The primary assignments of this committee are to identify opportunities for increased efficiency and fairness through collaborative efforts by agencies with overlapping or related missions; to work for removal of statutory, procedural, and other barriers to such coordination; and, in particular, to propose procedures for eliminating duplication of effort and inconsistencies in regulatory requirements.

Chairman: BETTY JO CHRISTIAN

Vice Chairman: A. JAMES BARNES

Pending Projects:

- i. Identification of alternatives to federal regulation (consultant: Philip J. Harter)
- ii. Preemption of state regulation by the federal government (consultant: Edmund W. Kitch)
- iii. Siting of large scale energy development projects (consultant: Gregory L. Ogden)
- iv. Representation by non-lawyers in agency proceedings (consultant: Jonathan Rose)
- v. Regulation through waivers and exemptions (consultant: Peter H. Schuck)

Committee on Rulemaking

This committee considers the form and adequacy of procedures employed by agencies in issuing rules and regulations, with particular emphasis on the advantages and disadvantages of various procedural concepts and innovations, and on methods by which the views of affected individuals, businesses, and other interested persons can be effectively presented and considered in the rulemaking process.

Chairman: CALVIN J. COLLIER

Vice Chairman: STEPHEN A. SHARP

Pending Projects:

- i. Rulemaking as an organizational process (consultant: Fred Emery)
- ii. "Good cause" exemption from informal rulemaking (consultant: Ellen R. Jordan)
- iii. Evaluation of regulatory analysis requirements (consultant: Thomas O. McGarity)
- iv. Procedures for amending or revoking rules promulgated in hybrid rulemaking proceedings (consultant: Stephen G. Wood)



Public Member H. Clayton Cook, Jr. (seated, far right), Chairman of the Committee on Judicial Review, leads the discussion on Recommendation 82-7 at the 25th Plenary Session. Others at the dias (left to right): Mary Candace Fowler (Staff Attorney), Dean Paul R. Verkuil (Consultant), Richard K. Berg (General Counsel), and (standing) Chairman Loren A. Smith.

ACTIVITIES OF THE CHAIRMAN'S OFFICE

BUDGET AND STAFF

The Conference's budget for fiscal year 1982, which ended on September 30, 1982, was \$1,103,000. For fiscal year 1983, the Conference was given \$1,100,000 in the continuing resolution enacted on December 21, 1982, and had pending at the end of calendar year 1982 a supplemental request for an additional \$59,000 for fiscal year 1983. The full-time permanent staff of the Office of the Chairman varied between 17 and 18 during the year. As in recent years, the Conference has conducted most of its research by using the services of outside academic or professional consultants. The chart below illustrates that, while the authorized ceiling for Conference funding has risen significantly in the past several years, the budget of the Conference has remained about constant.

FY	Authorization	Budget	Staff
1983	\$2,300,000	\$1,159,000*	18*
1982	\$2,300,000	\$1,103,000	17
1981	\$2,300,000	\$1,167,000	19
1980	\$2,000,000	\$1,119,000	19
1979	\$1,700,000	\$1,062,000	20
1978	\$950,000	\$935,000	18

* Estimated for FY 1983

The Conference also received \$50,500 from other agencies—a portion in fiscal year 1982 and another portion in fiscal year 1983—to assist in funding a regulatory colloquia series. In fiscal year 1983 an additional \$110,000 will be provided by the Merit Systems Protection Board to reimburse the Conference for a study and evaluation by the Office of the Chairman of MSPB's experimental voluntary arbitration procedures. The regulatory colloquia series and the MSPB project are described later in this report.

In 1982 the Conference was reauthorized to receive amounts not in excess of \$2,300,000 per year for fiscal years 1983 through 1986.

ADVICE AND ASSISTANCE TO AGENCIES

Furnishing advice and assistance on problems of administrative procedure to the agencies is a significant function of the staff of the Office of the Chairman. The Administrative Conference Act specifically con-

templates a role for the Conference in assisting the agencies—and in arranging for the interchange of information among them—on procedural matters.

Because of the Conference's perspective over the broad range of agencies and their administrative programs, the consultative capacity of its staff is a unique resource. The Office of the Chairman continued to perform its advisory and consultative functions during 1982, responding to numerous requests from agencies for guidance on procedural issues. Some of the items receiving staff assistance during the year are as follows.

<i>Agency</i>	<i>Item receiving assistance</i>
Federal Aviation Administration	Staff member detailed to FAA General Counsel's Office to work on procurement matters
General Services Administration	Consultation concerning Conference Recommendation 80-3: Interpretation and Implementation of the Federal Advisory Committee Act
Office of Management and Budget	Proposed revision of OMB Circular A-119 on federal policy concerning voluntary standards

ADVICE AND ASSISTANCE ON LEGISLATION

The legislative activities of the Office of the Chairman included the preparation and submission of legislation to extend the authorization of the Conference. The appropriations authorization for the Conference, which expired at the end of fiscal year 1982, was extended at its previous level of \$2,300,000 for an additional four years by Public Law 97-330. In support of this legislation Chairman Smith, together with Executive Director Babcock, General Counsel Berg, and Research Director Lubbers, testified at two oversight hearings before a subcommittee of the House Judiciary Committee on February 10 and March 2.

In addition to transmitting to appropriate congressional committees those new Conference recommendations which call for legislative action, the Office of the Chairman furnished written comments to the House Ways and Means Committee on H.R. 5700, a bill to amend Title II of the Social Security Act; to the Senate Governmental Affairs Committee on S. 2064, a bill to authorize reappointment of retired administrative law judges; and to the Judiciary Committees in both the Senate and the House on immigration reform legislation. The comments on immigration

reform were influential in effecting changes in the bill passed by the Senate, but the session concluded without action on the House side.

Comments in support of an amendment to S. 1730 urging the implementation of Recommendation 81-1: Procedures for Assessing and Collecting Freedom of Information Act Fees were submitted to the Subcommittee on the Constitution of the Senate Committee on the Judiciary.

The Office also continued to provide comments and to consult informally with the Office of Management and Budget and with congressional staff on regulatory reform legislation.

CLEARINGHOUSE ACTIVITIES

One of the statutory missions of the Administrative Conference is to "arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure." 5 U.S.C. 574(2). During the year Chairman Smith has overseen the initiation of two key new activities in this area: the establishment of the Council of Independent Regulatory Agencies, and the establishment of periodic informal roundtable meetings of independent agency general counsels. Chairman Smith has also become a member of two of the President's Cabinet Councils: the Cabinet Council on Legal Policy, and the Cabinet Council on Management and Administration. The Office of the Chairman has also held a series of regulatory colloquia for government officials.

CIRA

The Council of Independent Regulatory Agencies (CIRA) is an informal organization composed of the chairmen of the fourteen major independent regulatory boards and commissions. At its monthly meetings agency chairmen exchange ideas concerning governmental and regulatory issues and problems, and discuss such issues with former academics, senators and congressmen, former agency chairmen, and other prominent persons from private life. The first CIRA meeting was held at the White House on April 16, 1982, with President Reagan and Counsellor to the President Edwin Meese III. In November 1982 the group produced a report, "Regulatory Relief at the Independent Regulatory Agencies," detailing the agencies' regulatory relief accomplishments over the preceding year and their plans for further initiatives. The agency chairmen who are members of this organization are:

Loren A. Smith, CIRA <i>Chairman</i>	Administrative Conference
Dan McKinnon	Civil Aeronautics Board
Philip McBride Johnson	Commodity Futures Trading Commission
Nancy Harvey Steorts	Consumer Product Safety Commission
Clarence Thomas	Equal Employment Opportunity Commission
Mark S. Fowler	Federal Communications Commission
C. M. Butler III	Federal Energy Regulatory Commission



Guests and members converse at the Reception for the 25th Plenary Session. Above: Betty Southard Murphy, of the Washington, D.C. law firm of Baker and Hostetter, left, and Edwin Meese III, Counselor to the President. Center: William A. Butler (Public Member), left, and James G. Watt, Secretary of the Interior. Below: John S.R. Shad, Chairman, Securities and Exchange Commission, left, and Stephen L. Babcock, Executive Director.

Richard T. Pratt	Federal Home Loan Bank Board
Alan F. Green, Jr.	Federal Maritime Commission
Paul A. Volcker	Federal Reserve System
James C. Miller III	Federal Trade Commission
Reese H. Taylor, Jr.	Interstate Commerce Commission
John C. Miller	National Labor Relations Board
Nunzio J. Palladino, Jr.	Nuclear Regulatory Commission
John S. R. Shad	Securities and Exchange Commission

Executive Director Stephen L. Babcock serves as secretary to this group.

Independent Agency General Counsel's Meetings

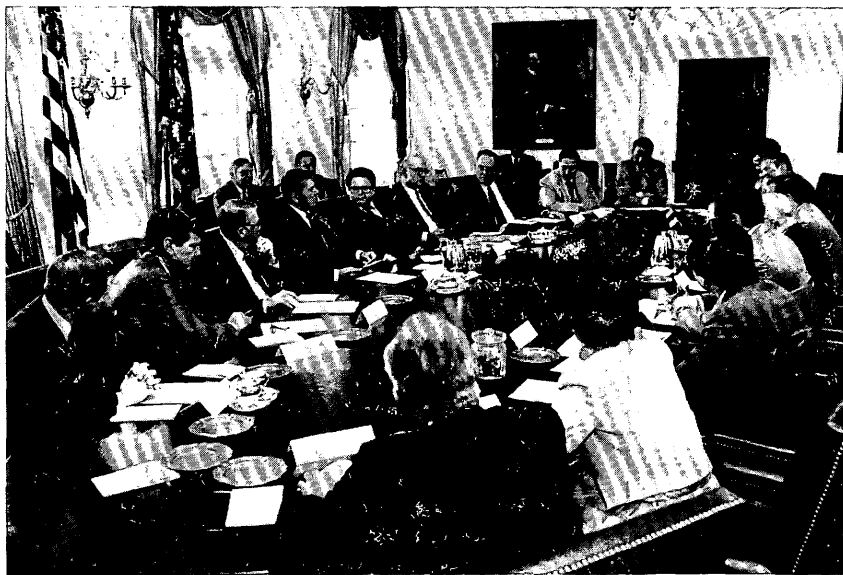
As part of the Conference's program of encouraging the interchange among agencies of information potentially useful in improving administrative procedure, Chairman Smith proposed to the general counsels of the independent regulatory agencies a series of informal meetings to discuss subjects of mutual interest. The response was affirmative, and Conference General Counsel Richard Berg has chaired a steering committee to arrange the meetings. In two meetings held during 1982, the group discussed such topics as the organization of a general counsel's office, staff relationships with agency members, and recent developments under the Government in the Sunshine Act. General counsels from seventeen agencies have participated. Meetings in 1983 at six-week to eight-week intervals are planned.

Cabinet Council Membership

Chairman Smith has also increased the ability of the Administrative Conference to act as a focal point for the discussion of intra-governmental issues through his membership in two of the President's Cabinet Councils: the Cabinet Council on Legal Policy and the Cabinet Council on Management and Administration.

The Cabinet Council on Legal Policy, headed by the President and chaired pro-tem by Attorney General William French Smith, is the focal point for decisions on legal questions of government-wide importance. In addition to the President, the Attorney General, and Conference Chairman Loren A. Smith, membership in this Cabinet Council includes the Vice President; the Secretaries of State, Treasury, Interior, Commerce, Labor, and Transportation; the Counsellor to the President; and the Director of the Office of Management and Budget.

The Cabinet Council on Management and Administration, also headed by the President, is chaired pro-tem by Counsellor to the President Edwin Meese III. Its other members are the Vice President; the Secretaries of Treasury, Defense, Commerce, Health and Human Services, Transportation, and Energy; the Administrator of the General Services Administration; and the Directors of the Office of Management and Budget and the Office of Personnel Management. The Cabinet Council on Management and Administration deals with government-wide ques-



President Reagan speaks to agency chairmen at the White House in the initial meeting of the Council of Independent Regulatory Agencies. Around the far side of the table, left to right: Dan McKinnon (CAB); Edwin Meese III, Counselor to the President; President Reagan; Loren A. Smith (ACUS), Chairman of CIRA; Paul A. Volcker (Federal Reserve Board); John S.R. Shad (SEC); Nunzio D. Palladino (NRC); and James A. Baker, White House Chief of Staff. Seated around the wall, facing the table, left to right: Stephen L. Babcock (ACUS), CIRA secretary; Richard K. Berg (ACUS), Chairman of independent agency general counsel's steering committee; and Fred F. Fielding, Counsel to the President. Other agency chairmen at the first CIRA meeting (alphabetical order): C.M. Butler III (FERC), Mark S. Fowler (FCC), Alan Green, Jr. (FMC), Philip McBride Johnson (CFTC), James C. Miller III (FTC), Richard T. Pratt (FHLBB), Cathie A. Shattuck (EEOC, acting chairman), Nancy Harvey Steorts (CPSC), Reese H. Taylor, Jr. (ICC), and John Van de Water (NLRB).

tions involving personnel, space utilization, financial management, governmental organization and structure, and other general management issues. Executive Director Babcock is a member of the Council's Secretariat, which meets twice to three times each month to discuss matters to be placed on the Council's agenda.

Regulatory Colloquia

In 1982 the Office of the Chairman began sponsoring an interagency "Colloquium on Regulatory Design in Theory and Practice" in which speakers from the academic and research communities share their ideas on regulatory reform with lawyers, economists, and policy analysts from a wide variety of federal agencies. The series is run by Conference consultant Dr. Harold I. Sharlin, and is supported by financial contributions from the Federal Trade Commission, the Nuclear Regulatory

Commission, the National Science Foundation, the Postal Rate Commission, and the Departments of Agriculture, Transportation, and Health and Human Services.

Speakers and their topics at sessions held in 1982 were:

Marc Roberts (Harvard): Variations in Corporate Strategy in Response to Government Regulation

Claude Barfield (American Enterprise Institute): Deregulation by Block Grants

Roger Noll (California Institute of Technology): Can Regulatory Policies Promote New Technology?

Martin Shapiro (Yale): The Future of Administrative Law

International Interchange

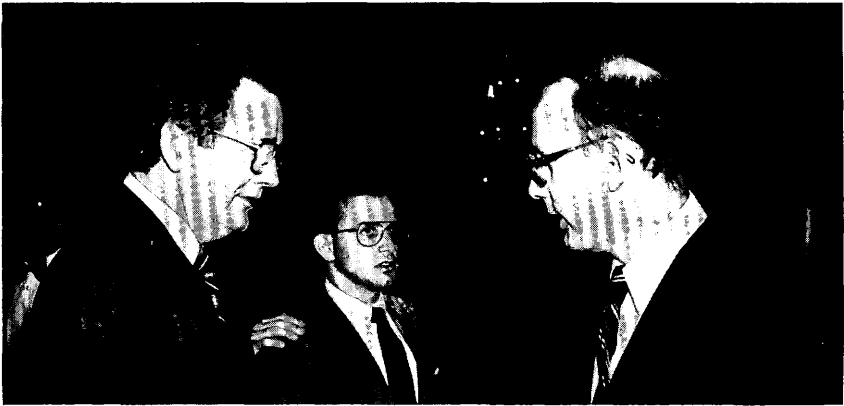
Each year the Office of the Chairman is visited by representatives of organizations within foreign governments that play roles similar to that of the Conference. The year 1982 was no exception. The Conference was visited by Mr. Charles A. Marvin of the Law Reform Commission of Canada, by Justice Michael Kirby, Chairman of the Australian Law Reform Commission, and by Mr. Masuho Tanaka, an Assistant Director in the Administrative Management Agency of the Japanese Government.

This year the Conference for the first time undertook activities of its own in this area. In October Chairman Smith visited Italy, Switzerland, and the Federal Republic of Germany, speaking to government officials, academics, and other interested groups on the work of the Conference, regulatory relief, and related topics. During this trip, which was sponsored by the United States Information Agency, Chairman Smith spoke or attended meetings in seven German cities, five Italian cities, and two Swiss cities. The Conference will continue its international exchange activities in 1983. The work of the Conference will benefit from continuing exposure to the viewpoints of those engaged in like activities in other countries.

RESEARCH ACTIVITIES

Research Planning

In accordance with the Assembly's *Resolution on Research Planning* (June 6, 1980), Research Director Jeffrey S. Lubbers prepared a research plan for 1983. The plan discussed planning assumptions, the selection process, factors used in making the selections, and the focus for the immediate future. Appended were lists of pending projects and lists of potential research topics. The plan was discussed by the Assembly in December and was also presented to the Council for its evaluation at subsequent Council meetings.



Guests mingle at the Reception for the 25th Plenary Session. Above, left to right: John R. Block, Secretary of Agriculture; James C. Miller III (Council Member); and Roger Moore (Special Parliamentarian). Center, left to right: Raymond J. Donovan, Secretary of Labor; Albert Angrisani, Assistant Secretary of Labor for Employment and Training; and Hugh Joseph Beard, Jr., Deputy General Counsel, Department of Education. Below: Edwin Meese III, Counselor to the President, left; and Stephen L. Babcock, Executive Director.

Research Projects Commissioned in 1982

Disclosure of business information to attorneys in international trade cases

Section 777 of the Trade Agreements Act of 1979 spells out procedures by which the U.S. International Trade Commission may disclose confidential information obtained in an investigation of import practices to other parties under a protective order. The Conference has commissioned former Chairman Robert A. Anthony to study whether the protection provided by these procedures is adequate.

Procedures for effective implementation of block grant programs

With the accelerating trend away from categorical grants and toward block grants to states, the federal role has been reduced—but not eliminated. Questions concerning the applicability of cross-cutting federal requirements, auditing procedures and standards, and transition difficulties are potential subjects for litigation in federal court. The Conference has commissioned Professor George D. Brown of Boston College Law School to conduct a study that will prepare federal agencies for the inevitable need to resolve these issues.

Development of a framework for identifying and coordinating alternatives to federal regulation

Philip J. Harter, with his subcontractor George Eads, will develop a framework to coordinate various alternatives to federal regulation, including voluntary standards, product liability law, insurance, state-imposed product standards, and product recalls.

"Good cause" exemption from notice-and-comment procedures in rulemaking

Although the Conference has studied and made recommendations on the other major exemptions in 5 U.S.C. 553, it has never studied the good cause exemption. This exemption has been invoked more frequently lately, and its somewhat vague formulation has led to a good deal of litigation. In addition, legislation has been proposed that would modify this exemption. Professor Ellen R. Jordan of the University of Georgia School of Law will examine cases and materials on this issue, and study the practices of several selected agencies.

Relationship between regulatory relief and the need for federal preemption of certain regulatory areas to avoid uneven state regulation

A number of industries has attempted to obtain relief from uneven state regulation by seeking preemptive federal regulation. This study, of special interest to OMB's Office of Information and Regulatory Affairs, will explore what standards and considerations should govern

Active Research Projects (December 31, 1982)

Project	Committee*	Consultant
ALJ decisions, agency internal review procedures	ADJ	Ronald Cass
ALJ performance evaluation, by agencies	ADJ	Victor G. Rosenblum
Alternatives to federal regulation, framework for identifying	REG	Philip J. Harter
Block grants, effective implementation of	ADM	George D. Brown
British Council of Tribunals, operations of	—	John H. Reese
Cost-benefit analysis, statutory inhibitions on use of	—	Alfred S. Neely IV
Declaratory orders under the APA	—	Burnele V. Powell
Discretion, control through articulation of policy standards	JR	Colin Diver
FOIA, use of for discovery purposes	GP	Edward A. Tomlinson
Grants, consistent administration—organizational approaches	ADM	Sallyanne Payton
Government in the Sunshine Act, assessment	ADJ	David M. Welborn
Information disclosure, international trade cases	—	Robert A. Anthony
Inspections for regulatory violations	GP	Jack M. Kress
Licensing hearings, narrowing or avoiding	—	Conference Staff
Model rules of procedure, areas of feasibility	—	Conference Staff
Preemption of state regulation by the federal government	REG	Edmund W. Kitch
Regulation through waivers and exemptions	REG	Peter H. Schuck
Reducing delay in agency proceedings	—	Conference Staff
Regulatory analysis requirement, evaluation of	RM	Thomas O. McGarity
Representation by non-lawyers in agency proceedings	REG	Jonathan Rose
Rulemaking as an organizational process	RM	Fred Emery

* Committees:

ADJ Adjudication
ADM Administration
GP Governmental Processes

JR Judicial Review
REG Regulation
RM Rulemaking
— Unassigned

Active Research Projects (December 31, 1982) (continued)

Project	Committee*	Consultant
Rulemaking, good cause exemption from	RM	Ellen R. Jordan
Rules, procedures for amendment or repeal	RM	Stephen G. Wood
Siting of energy development projects	REG	Gregory L. Ogden
State administrative law, innovations for federal use	—	L. Harold Levinson

* Committees:

ADJ	Adjudication	JR	Judicial Review
ADM	Administration	REG	Regulation
GP	Governmental Processes	RM	Rulemaking
		—	Unassigned

preemption decisions. Professor Edmund W. Kitch of the University of Virginia School of Law will review several regulatory programs involving dual roles for federal and state regulators.

Legal and practical issues relating to inspections by federal agencies for regulatory violations

Since the Supreme Court, in *Marshall v. Barlow's, Inc.* (1978), ruled that OSHA inspections require search warrants, some agencies have been subject to a warrant requirement and some have not. Questions have arisen for both categories of agencies. Also, questions have arisen about the use of consultants for inspections and the use of airborne surveillance techniques. The Conference has commissioned Professor Jack M. Kress of Delaware Law School to study these matters.

Federal agency implementation of the "regulatory analysis" requirement in rulemaking

Federal agencies have been conducting regulatory analyses under several executive orders for the past six years. Regulatory reform bills in the 97th Congress would have made this a statutory requirement for all major rules. Although there is widespread consensus that such analyses can be useful, the Conference will examine how well agencies have been integrating this requirement into their rulemaking processes and whether changes are needed. Professor Thomas O. McGarity of the University of Texas School of Law will be conducting this study for the Conference.

Siting of large-scale energy development projects

The approval of large-scale energy development projects—pipeline terminals, oil refineries, nuclear power plants, synthetic fuel plants,

etc.—typically involves complex and overlapping regulatory issues and jurisdictions. Doubts about whether the single interest agency model is capable of handling these issues have led to proposals for “super agencies” such as the recently proposed Energy Mobilization Board. Professor Gregory L. Ogden of Pepperdine University School of Law will examine the abandoned Sohio pipeline terminal proceeding and will propose solutions to problems perceived regarding the single interest agency model. Professor Ogden will be investigating both voluntary and mandatory processes used throughout the nation in his study. The Conference is working closely on this project with the Advisory Commission on Intergovernmental Relations. ACIR will take an active role in reviewing and commenting on the consultant’s report and any proposed recommendations.

Use of declaratory orders under the Administrative Procedure Act

Although 5 U.S.C. 554(e) provides for agency use of declaratory orders to terminate controversies, this technique is rarely used. The Conference has commissioned Professor Burnele V. Powell of the University of North Carolina School of Law to help determine what, if anything, should be done to encourage greater use of declaratory orders.

Operations of the British Council of Tribunals

The activities of the British Council of Tribunals may provide lessons for ACUS on increasing the Conference’s role in procedural reform and improving implementation of Conference recommendations. Professor John H. Reese of the University of Denver College of Law will undertake this study during a teaching sabbatical as visiting professor at the University of Edinburgh in 1983–84.

Non-lawyer representation of participants in federal proceedings

Few agencies’ rules of practice address the issue of whether non-attorney experts can act in a representational role during agency proceedings. The Conference has contracted with Professor Jonathan Rose of Arizona State University College of Law to review available materials, conduct interviews, and prepare a report on the subject.

Use of the Freedom of Information Act as a discovery device in federal agency proceedings

The Freedom of Information Act has become a tool for parties to obtain documents from agencies in a litigation context. The Act is possibly being used to circumvent restrictive discovery rules or protective orders. The Conference has asked Professor Edward A. Tomlinson of the University of Maryland School of Law to study how exemption 5 of FOIA (tied to discovery concepts) has worked out.

PUBLICATIONS OF THE ADMINISTRATIVE CONFERENCE

The Administrative Conference Act provides for publication by the Conference of reports directed toward evaluating and improving administrative procedure. The Office of the Chairman publishes the officially adopted recommendations and statements of the Assembly, along with any accompanying research reports, as well as other reports and documents that the Chairman believes will further the purposes of the Act.

Continuing Publications

Recommendations and Reports

The four volume series entitled *Recommendations and Reports of the Administrative Conference of the United States* contains texts of the recommendations and statements adopted by the Assembly between January 8, 1968, and December 31, 1977. These volumes also contain related research reports. Since 1978 these materials have been published in annual volumes under the title *Administrative Conference of the United States: Recommendations and Reports*.

1982 Publications

Manual for Administrative Law Judges

The Conference's *Manual for Administrative Law Judges*, written by Judge Merritt Ruhlen, has enjoyed a circulation better than any other Conference publication. Since its first publication in 1974, formal administrative law has continued to expand causing the use, functions, and number of ALJs to increase substantially in federal, state, and local governments. Informal administrative proceedings have also become more varied with the increased use of summary judgment, stricter time limits, telephone conferences, multiple witness testimony, broadcast coverage of hearings, and many other practices.

To take account of some of these developments, Judge Ruhlen has written a revised edition of the *Manual*, published in April 1982. The revised *Manual* discusses recommended practices for the conduct of formal administrative proceedings. It includes new sections designed for special types of cases and a chapter on the writing of judicial decisions.

Single copies of the *Manual for Administrative Law Judges*, revised edition, 1982, are available free while the supply lasts from the Office of the Chairman. Multiple copies may be ordered from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402 at \$5.50 each (Stock No. 052-049-00013-0).

Current Publication Projects

ACUS Rulemaking Guide

The Chairman's Office, under the direction of Staff Attorney Michael W. Bowers, is writing a guide to federal agency rulemaking. The guide will include a discussion of the rulemaking process, identifying legal problems, raising issues, providing guidance, and pointing the way to additional cases, articles, and source materials for further research. The guide will also be used to publicize and foster implementation of numerous Conference recommendations in the rulemaking area.

A first draft of the guide was completed and circulated to the Committee on Rulemaking in December 1982. The final version of the guide is expected to be published in mid-1983 following circulation of the draft guide for comment.

SPECIAL ACTIVITIES

Equal Access to Justice Act

The Equal Access to Justice Act provides that certain parties who prevail over the government in administrative or court proceedings are entitled to an award of attorneys' fees and expenses unless the government can demonstrate that its position in the action was substantially justified. The class eligible to receive such awards includes individuals whose net worth is not more than \$1,000,000, organizations whose net worth is not more than \$5,000,000 and who have no more than 500 employees, tax exempt organizations, and certain agricultural cooperatives. The Act, which took effect on October 1, 1981, gave the Chairman of the Administrative Conference important consultative and reporting responsibilities.

The Chairman's consultative responsibility continued in 1982 as the Office of the Chairman submitted written comments to several agencies on their draft Equal Access to Justice Act rules and responded to agencies' inquiries and requests for assistance. The extensive use of the Conference's model rules (which were developed in 1981) by affected agencies promoted the statutory goal of uniformity and saved time and resources for the agencies.

The Act also requires the Chairman of the Conference, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, to report annually to the Congress on the amount of fees and other expenses awarded under the Act during the preceding fiscal year. These reports are to describe the number, nature, and the amount of the awards; the claims involved in the controversy; and any other relevant information which may aid the Congress in evaluating the scope and impact of this program.

The first annual report, made in December, includes data on adjudications handled by agencies and on the applications for awards received and disposed of in administrative proceedings during the Act's first year. While no awards of fees were granted by agencies during this period, the report identifies the reasons for denial of awards and the types of proceedings in which the denials occurred. The report is based on data provided by agencies through a reporting system developed by the Conference staff in 1981.

The Office's efforts in 1982 were handled by Executive Director Stephen L. Babcock and Staff Attorney Mary Candace Fowler. They presented the first annual report, and testimony concerning the Act, in hearings held in December by the Senate Judiciary Committee's Subcommittee on Agency Administration, chaired by Senator Charles E. Grassley.

Merit Systems Protection Board's Alternative Dispute Resolution System

In September 1982 the Office of the Chairman agreed to assist the Merit Systems Protection Board to implement a pilot program for an expedited alternative dispute resolution system mandated by the Civil Service Reform Act of 1978. The system will be instituted on a one-year experimental basis in four of the MSPB's regional offices in 1983. The MSPB has provided the funding that will enable the Conference to give outreach, training, and evaluation assistance throughout this pilot program's course.

The MSPB's pilot program is intended to provide an inexpensive, expeditious method of processing disputes—particularly cases that do not raise complex legal or policy questions. The Board hopes that the program will reduce the resources required to handle cases; fulfill congressional directives to adopt suitable means of conciliation, mediation, arbitration, and other methods; and enhance the acceptability of MSPB decisions to affected parties. The program is expected to include shorter time frames for resolving personnel actions, a narrower standard of Board review of decisions by hearing examiners, less detailed decisions by hearing examiners, and increased efforts by hearing examiners to resolve cases informally.

The Conference's role in this project will proceed in three phases. Phase 1, outreach, began in October 1982. This initial phase involves critically reviewing and commenting on legal and administrative aspects of MSPB's draft proposal, designing criteria for selecting regions in which the pilot program will be run, helping draft the notice of proposed rulemaking for the project, and dealing with comments received. The consultant for this phase, Philip Harter, and staff of the Office of the Chairman—primarily Messrs. Pou, Babcock, and Lubbers—have been working closely with the MSPB on these matters. Once the MSPB's

experimental program is operational, Mr. Harter will examine its workings and report on whether additional dispute resolution techniques (e.g., mediation or conciliation) should be given greater emphasis.

Phase 2 will involve training in arbitration and negotiation techniques for hearing examiners now employed at the MSPB's four participating regional offices. A second consultant will be retained to design a training course that meets the Board's needs. Talks have been initiated with representatives of the American Arbitration Association and the American Bar Association's Special Committee on Alternative Means of Dispute Resolution in an effort to locate qualified candidates for the Phase 2 consultant.

Once the pilot program is in place and the selected hearing examiners have been trained, the Conference will hire and work with one or more experts in evaluation of program effectiveness in an effort to determine the relative success or failure of the experiment. This third phase will involve considerable work in developing an evaluation plan that fixes criteria by which to measure the experiment's effectiveness, gathering statistical data on its impact, interviewing agency officials and government employees who have participated in cases under the program, and, ultimately, presenting the MSPB with the results of the study and recommendations for improving the system.

BYLAWS OF THE ADMINISTRATIVE CONFERENCE*

Section 1: ESTABLISHMENT AND OBJECTIVE

The Administrative Conference Act, 5 U.S.C. §571 et seq. (1976), 78 Stat. 615 (1964), authorized the establishment of the Administrative Conference of the United States as a permanent, independent agency of the Federal Government. The purpose of the Administrative Conference is to improve the administrative procedure of Federal agencies to the end that they may fairly and expeditiously carry out their responsibilities to protect private rights and the public interest. The Administrative Conference Act provides for the membership, organization, powers, and duties of the Conference.

Section 2: MEMBERSHIP

(a) General

(1) Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private. Each member (other than a member of the Council) shall be appointed to one of the standing committees of the Conference.

(2) Each member is expected to devote personal and conscientious attention to the work of the Conference and to attend plenary sessions and committee meetings regularly. When a member has failed to attend two consecutive Conference functions, either plenary sessions, committee meetings, or both, the Chairman shall inquire into the reasons for the non-attendance. If not satisfied by such reasons, the Chairman shall: (a) in the case of a Government member, with the approval of the Council, request the head of the appointing agency to designate a member who is able to devote the necessary attention; or (b) in the case of a non-Government member, with the approval of the Council, terminate the member's appointment, provided that where the Chairman proposes to remove a non-Government member, the member first shall be entitled to submit a written statement to the Council. The foregoing does not imply that satisfying minimum attendance standards constitutes full discharge of a member's responsibilities, nor does it foreclose action by the Chairman to stimulate the fulfillment of a member's obligations.

* As revised December 18, 1982. The bylaws are codified in the Code of Federal Regulations, Title 1, Part 302 (e.g., Section 1 of the bylaws appears at 1 C.F.R. §302.1).

(b) Terms of Non-Government Members

The terms of non-Government members, who are appointed by the Chairman with the approval of the Council, shall terminate at 2-year intervals from June 30, 1970. No non-Government members, other than senior fellows, shall at any time be in continuous service beyond four full terms.

(c) Eligibility and Replacements

(1) A member designated by a Federal agency shall become ineligible to continue as a member of the Conference in that capacity or under that designation if he leaves the service of the agency or department. Designations and re-designations of members shall be filed with the Chairman promptly.

(2) A person appointed as a non-Government member shall become ineligible to continue in that capacity if he enters full-time Government service. In the event a non-Government member of the Conference resigns or becomes ineligible to continue as a member, the appointing authority shall appoint a successor for the remainder of the term.

(d) Alternates

Members may not act through alternates at plenary sessions of the Conference. Where circumstances justify, a suitably informed alternate may be permitted, with the approval of a committee, to participate for a member in a meeting of the committee, but such alternate shall not have the privilege of a vote in respect to any action of the committee. Use of an alternate does not lessen the obligation of regular personal attendance set forth in paragraph (2) of subsection (a).

(e) Senior Fellows

The Chairman may, with the approval of the Council, appoint persons who have served as members of the Conference for eight or more years, or former Chairmen of the Conference, to the position of senior fellow. The terms of senior fellows shall terminate at 2-year intervals from June 30, 1970. Senior fellows shall have all the privileges of members, but may not vote.

Section 3: COMMITTEES

The Conference shall have the following standing committees:

1. Committee on Adjudication;
2. Committee on Administration;
3. Committee on Governmental Processes;
4. Committee on Judicial Review;
5. Committee on Regulation; and
6. Committee on Rulemaking.

The activities of the committees shall not be limited to the areas described in their titles, and the Chairman may redefine the responsibilities of the committees and assign new or additional projects to them. With the approval of the Council, the Chairman may establish special ad hoc committees and assign special projects to such committees. The Chairman shall coordinate the activities of all committees to avoid duplication of effort and conflict in their activities.

Section 4: LIAISON ARRANGEMENTS

The Chairman, with the approval of the Council, may make liaison arrangements with representatives of the Congress, the judiciary, Federal agencies which are not represented on the Conference, and professional associations. Persons appointed under these arrangements may participate in the activities of a designated committee without vote; and may participate in the deliberations of the Conference with privileges of the floor, but without vote.

Section 5: AVOIDANCE OF CONFLICTS OF INTEREST

(a) Disclosure of Interests

(1) Non-Government members may be deemed to be special Government employees within the meaning of 18 U.S.C. §202 and subject to the provisions of sections 201--224 of title 18 U.S.C., in accordance with their terms. The Chairman of the Conference is authorized to prescribe requirements for the filing of statements of employment and financial interests necessary to comply with part III of Executive Order 11222, as amended, or any successor Presidential or statutory requirement. Without conceding the correctness of the view that non-Government members are special Government employees, the Conference has chosen to adopt the bylaw provisions that follow in order to eliminate whatever uncertainties might otherwise exist concerning the propriety of participation in Conference proceedings.

(2) In addition to complying with any requirement prescribed by statute or executive order, each member, public or governmental, shall, upon appointment to the Conference and annually thereafter, file a brief general statement describing the nature of his or her practice or affiliations, including, in the case of a member of a partnership, a general statement about the nature of the business or practice of the partnership, to the extent that such business, practice, or affiliations might reasonably be thought to affect the member's judgment on matters with which the Conference is concerned. (For example, a member might state that he or she represents employers or unions before the National Labor Relations Board, broadcasters before the Federal Communications Commission, or consumer groups before agencies and courts.) The

Chairman will include with the agenda for each plenary session a statement calling to the attention of the members the requirements of this section. Each member who believes the content of the agenda calls for disclosure additional to that already on file will file an amended statement concerning his or her interests. Current statements of all members will be open to public inspection at the Office of the Chairman and will be readily available at any plenary session. Except as provided in subsection (b), members may vote or participate in matters before the Conference without additional disclosure of interest.

(b) Disqualifications

(1) In accordance with 18 U.S.C. §208 a member shall not, except as provided in paragraphs (2) or (3) of this subsection, vote or otherwise participate as a member in the disposition of any particular matter of Conference business, including the adoption of recommendations and other statements, in which, to his or her knowledge, the member has a financial interest. For purposes of this subsection (b) a member is deemed to have a financial interest in any particular matter in which the member, the member's spouse, minor child, partner, organization in which the member is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he or she is negotiating or has any arrangement concerning prospective employment, has a financial interest.

(2) Notwithstanding paragraph (1), a member may, at any stage of Conference consideration and without further disclosure, participate and vote on a proposed recommendation or other Conference statement or action relating to the procedure of any Federal agency or agencies, where the Conference action is not directed to and is unlikely to affect the substantive outcome of any pending judicial matter or administrative proceeding involving a specific party or parties (other than the United States) in which to his knowledge he has a financial interest. The Conference determines pursuant to 18 U.S.C. §208(b) that in such a case any financial interest which the member may have in the matter before the Conference is too remote to affect the integrity of the member's service to the Conference.

(3) Where a member believes that he or she is or may be disqualified from participating in the disposition of a matter before the Conference under the provisions of this subsection, the member may advise the Chairman of the reason for his or her possible disqualification, including a full disclosure of the financial interest involved. If the Chairman determines in writing pursuant to 18 U.S.C. §208(b) that the interest is not so substantial as to be likely to affect the integrity of the member's service to the Conference, the member may, upon receipt of such determination, vote and otherwise participate in the disposition of the matter.

Section 6: GENERAL

(a) Meetings

All sessions of the Assembly shall be public. Privileges of the floor, however, extend only to: (1) Members of the Conference, (2) persons appointed pursuant to section 4, (3) consultants and staff members insofar as matters on which they have been engaged are under consideration, and (4) persons who, prior to the commencement of the meeting, have obtained the approval of the Chairman and who speak with the unanimous consent of the Assembly.

(b) Quorums

A majority of the members of the Conference shall constitute a quorum of the Assembly; a majority of the Council shall constitute a quorum of the Council.

(c) Separate Statements

(1) A member who disagrees in whole or in part with a recommendation adopted by the Assembly is entitled to enter a separate statement in the record of the Conference proceedings and to have it set forth with the official publication of the recommendation in the Federal Register. A member's failure to file or join in such a separate statement does not necessarily indicate his agreement with the recommendation.

(2) Notification of intention to file a separate statement must be given to the Executive Secretary not later than the last day of the plenary session at which the recommendation is adopted. Members may, without giving such notification, join in a separate statement for which proper notification has been given.

(3) Separate statements must be filed within 10 days after the close of the session, but the Chairman may extend this deadline for good cause.

(d) Amendment of Bylaws

The Conference may amend the bylaws provided that 30 days' notice of the proposed amendment shall be given to all members of the Assembly by the Chairman.

(e) Procedure

Robert's Rules of Order shall govern the proceedings of the Assembly to the extent appropriate.



THE ADMINISTRATIVE CONFERENCE ACT

TITLE 5, UNITED STATES CODE, CHAPTER 5

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES*

§ 571. Purpose

It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may co-operatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.

§ 572. Definitions

For the purpose of this subchapter—

(1) “administrative program” includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter, except that it does not include a military or foreign affairs function of the United States;

(2) “administrative agency” means an authority as defined by section 551(1) of this title; and

(3) “administrative procedure” means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.

* Public Law 88-499, August 30, 1964, 78 Stat. 615; as codified by Public Law 89-554, September 6, 1966, 80 Stat. 388-390; as amended by Public Law 92-526, Section 1, October 21, 1972, 86 Stat. 1048; as amended by Public Law 97-330, October 15, 1982, 96 Stat. 1618.

§ 573. Administrative Conference of the United States

(a) The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection (b) of this section.

(b) The Conference is composed of—

(1) a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575(b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.

(c) Members of the Conference, except the Chairman, are not entitled to pay for service. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

§ 574. Powers and duties of the Conference

To carry out the purpose of this subchapter, the Administrative Conference of the United States may—

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to adminis-

trative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;

(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and

(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

§ 575. Organization of the Conference

(a) The membership of the Administrative Conference of the United States meeting in plenary session constitutes the Assembly of the Conference. The Assembly has ultimate authority over all activities of the Conference. Specifically, it has the power to—

(1) adopt such recommendations as it considers appropriate for improving administrative procedure. A member who disagrees with a recommendation adopted by the Assembly is entitled to enter a dissenting opinion and an alternate proposal in the record of the Conference proceedings, and the opinion and proposal so entered shall accompany the Conference recommendation in a publication or distribution thereof; and

(2) adopt bylaws and regulations not inconsistent with this subchapter for carrying out the functions of the Conference, including the creation of such committees as it considers necessary for the conduct of studies and the development of recommendations for consideration by the Assembly.

(b) The Conference includes a Council composed of the Chairman of the Conference, who is Chairman of the Council, and 10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments. The President may designate a member of the Council as Vice Chairman. During the absence or incapacity of the Chairman, or when that office is vacant, the Vice Chairman shall serve as Chairman. The term of each member, except the Chairman, is 3 years. When the term of a member ends, he may continue to serve until a successor is appointed. However, the service of any member ends when a change in his employment status would make him ineligible for Council membership under the conditions of his original appointment. The Council has the power to—

(1) determine the time and place of plenary sessions of the Conference and the agenda for the sessions. The Council shall call at least one plenary session each year;

(2) propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Assembly;

(3) make recommendations to the Conference or its committees on a subject germane to the purpose of the Conference;

(4) receive and consider reports and recommendations of committees of the Conference and send them to members of the Conference with the views and recommendations of the Council;

(5) designate a member of the Council to preside at meetings of the Council in the absence or incapacity of the Chairman and Vice Chairman;

(6) designate such additional officers of the Conference as it considers desirable;

(7) approve or revise the budgetary proposals of the Chairman; and

(8) exercise such other powers as may be delegated to it by the Assembly.

(c) The Chairman is the chief executive of the Conference. In that capacity he has the power to—

(1) make inquiries into matters he considers important for Conference consideration, including matters proposed by individuals inside or outside the Federal Government;

(2) be the official spokesman for the Conference in relations with the several branches and agencies of the Federal Government and with interested organizations and individuals outside the Government, including responsibility for encouraging Federal agencies to carry out the recommendations of the Conference;

(3) request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law;

(4) recommend to the Council appropriate subjects for action by the Conference;

(5) appoint, with the approval of the Council, members of committees authorized by the bylaws and regulations of the Conference;

(6) prepare, for approval of the Council, estimates of the budgetary requirements of the Conference;

(7) appoint and fix the pay of employees, define their duties and responsibilities, and direct and supervise their activities;

(8) rent office space in the District of Columbia;

(9) provide necessary services for the Assembly, the Council, and the committees of the Conference;

(10) organize and direct studies ordered by the Assembly or the Council, to contract for the performance of such studies with any public or private persons, firm, association, corporation, or institution under title III of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251--260), and to use from time to time, as appropriate, experts and consultants who may be employed in accordance with section 3109 of this title at rates not in excess of the maximum rate of pay for grade GS-15 as provided in section 5332 of this title;

(11) utilize, with their consent, the services and facilities of Federal agencies and of State and private agencies and instrumentalities with or without reimbursement;

(12) accept, hold, administer, and utilize gifts, devises, and bequests of property, both real and personal, for the purpose of aiding and facilitating the work of the Conference. Gifts and bequests of money and proceeds from sales of other property received as gifts, devises, or bequests shall be deposited in the Treasury and shall be disbursed upon the order of the Chairman. Property accepted pursuant to this section, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gifts, devises, or bequests. For purposes of Federal income, estate, or gift taxes, property accepted under this section shall be considered as a gift, devise, or bequest to the United States;

(13) accept voluntary and uncompensated services, notwithstanding the provisions of section 3679(b) of the Revised Statutes (31 U.S.C. 665(b));

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedure; and

(15) exercise such additional authority as the Council or Assembly delegates to him.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

§ 576. Appropriations

There are authorized to be appropriated to carry out the purposes of this subchapter sums not to exceed \$2,300,000 for the fiscal year ending September 30, 1982, and not to exceed \$2,300,000 for each fiscal year thereafter up to and including the fiscal year ending September 30, 1986.

